EDITOR'S NOTE

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No. 85-1772-CFX
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Docketed:
April 24, 1986

Title: Utah Division of State Lands, Petitioner
v.
United States, et al.

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Jensen, Dallin W.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1986		Application for extension of time to file petition and order granting same until April 25, 1986 (White, March 12, 1986).
2	Apr 24 1986	G	Petition for writ of certiorari filed.
4	May 28 1986		Order extending time to file response to petition until June 27, 1986.
5	Jun 27 1986		Brief amicus curiae of Alaska, et al. filed.
6	Jun 30 1986		Order further extending time to file response to petition until July 18, 1986.
7	Jul 23 1986		DISTRIBUTED. September 29, 1986
8	Jul 18 1986	X	Brief of respondents United States, et al. in opposition filed.
9	Aug 21 1986	X	Reply brief of petitioner Utah Div. of State Lands filed.
11	Oct 3 1986		REDISTRIBUTED. October 10, 1986
12	Oct 14 1986		Petition GRANTED.
			**********
13	Nov 17 1986		Record filed.
14	Nov 17 1986		Certified copy of C. A. proceedings received.
16	Nov 18 1986		Order extending time to file brief of petitioner on the merits until December 12, 1986.
17	Dec 12 1986		Joint appendix filed.
18	Dec 12 1986		Brief of petitioner Utah Div. of State Lands filed.
19	Dec 12 1986		Brief amicus curiae of Alaska, et al. filed.
20	Dec 16 1986		Record filed.
21	Dec 16 1986		Certified copy of original record, volumes I thru VII received.
23	Jan 9 1987		Order extending time to file brief of respondent on the merits until January 30, 1987.
24	Jan 29 1987		Order further extending time to file brief of respondent on the merits until February 6, 1987.
25	Feb 6 1987		Brief of respondents U.S., et al. filed.
26	Feb 6 1987		SET FOR ARGUMENT, Monday, March 23, 1987. (1st case)
27	Feb 10 1987		CIRCULATED.
28	Mar 13 1987	X	Reply brief of petitioner Utah Div. of State Lands filed.
29	Mar 23 1987		ARGUED.

85-1772

Supreme Court, U.S.
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CLERK

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Utah Lake is a navigable body of water whose bed Utah claims under the Equal Footing Doctrine. The United States claims the lakebed because the United States Geological Survey made a pre-statehood withdrawal of the lake as a reservoir site. The purported authority for the withdrawal was the Sundry Appropriations Act of 1888, which did not specify the reservoir sites to be withdrawn and did not refer to sovereign lands.

The questions presented are:

1. Whether the provisions of the 1888 Act defeat Utah's entitlement to the bed of Utah Lake under the Equal Footing Doctrine.

2. Whether the administrative withdrawal was statutorily authorized and, if so, whether the withdrawal is sufficient to defeat Utah's sovereign ownership.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE LOWER COURT HAS DEPRIVED UTAH OF ITS SOVEREIGN TITLE IN UTAH LAKE BY APPLYING A STANDARD IN CLEAR CONFLICT WITH THE CONSTITUTIONAL STANDARD ESTABLISHED BY THIS COURT, BY REVERSING THE ESTABLISHED PRESUMPTION, BY EVISCERATING THE FEDERAL TRUST OBLIGATION, AND BY DEMOTING SOVEREIGN LANDS TO THE STATUS OF PUBLIC LANDS	7
A. The Constitutional Requirements	7
B. The 1888 Act	9
C. The Decision Below	15
II. THE DECISION BELOW RAISES FUNDAMENTAL AND UNRESOLVED QUESTIONS BY DENYING UTAH'S TITLE ON THE BASIS OF THE 1889 ADMINISTRATIVE WITHDRAWAL	18
CONCLUSION	21

	Page
APPENDIX A: Opinion of Tenth Circuit Court of Appeals	1a
APPENDIX B: Memorandum Opinion and Order of United States District Court for Utah	28a
APPENDIX C: Amendments to 1888 Act	42a

TABLE OF AUTHORITIES

Cases:

Barker v. Harvey, 181 U.S. 481 (1901)	13
Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935)	7, 13, 21
California, ex rel. State Lands Comm'n v. United States, 457 U.S. 273 (1982)	7
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	9, 19
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)	13
Knight v. United Land Ass'n., 142 U.S. 161 (1891)	19
Mann v. Tacoma Land Co., 153 U.S. 273 (1894)	13, 20
Martin v. Waddell, 16 Pet. (41 U.S.) 367 (1842)	8, 11
Montana v. United States, 450 U.S. 544 (1981)	5, 7, 8, 9, 11, 12, 15, 16, 17, 18, 19, 20
Morton v. Mancari, 417 U.S. 535 (1974)	9
Newhall v. Sanger, 92 U.S. 761 (1875)	13

Page

Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 7

Packer v. Bird, 137 U.S. 661 (1891) 8

Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212 (1845) 2, 7, 11

Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947), on rhg, 111 Utah 68, 181 P.2d 213 (1947), and on second appeal after remand, 117 Utah 507, 217 P.2d 577 (1950) 6

Smelting Co. v. Kemp, 104 U.S. 636 (1881) 21

Smith v. Maryland, 18 How. 71 (1855) 7, 11

State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927) 6

U.S. v. Alaska, (No. 84, Original) 19

U.S. v. Aranson, 696 F.2d 654 (9th Cir. 1983) 17

U.S. v. California, 436 U.S. 32 (1978) 20

U.S. v. Holt State Bank, 270 U.S. 49 (1926) 8

U.S. v. Oregon, 295 U.S. 1 (1935) 8

Utah v. United States, 403 U.S. 9 (1971) 7

Statutes:

28 U.S.C. 1254(1) 2

28 U.S.C. 1331 4

28 U.S.C. 2201 4

28 U.S.C. 2409a 4

Page

43 U.S.C. 1311 ..... 4, 5

43 U.S.C. 1313 20

25 Stat. 505 (Sundry Appropriations Act of 1888) 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

26 Stat. 391 ..... 2, 14

26 Stat. 1101 ..... 2, 14

29 Stat. 599 ..... 2, 14

Miscellaneous:

19 Cong. Rec. 7012-7032, 8471, 8505-8513, and Appendix 496-498 (1888) 3

21 Cong. Rec. 7277, 7287, 7359, 7394, 7399, 7771, 7981 and 9155 (1890) 3

21 Cong. Rec. 7394 (1890) 13

21 Cong. Rec. 9155 (1890) 14

Senate Report No. 928, pp. 169-70 (1890) 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Utah, by and through its Division of State Lands, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 780 F.2d 1515 (Appendix A, App. 1a). The opinion of the United States

District Court for the Central Division of Utah (Jenkins, D.J.) is reported at 624 F.Supp. 622 (Appendix B, App. 28a).

JURISDICTION

The Tenth Circuit on December 26, 1985, entered a judgment and an opinion affirming the District Court's summary judgment quieting title to the bed of Utah Lake in the United States. App. 27a. No petition for rehearing was sought. On March 12, 1986, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including April 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27, is reproduced in relevant part at page 10. That Act was partially repealed or amended in 1890 (26 Stat. 391), in 1891 (26 Stat. 1101), and in 1897 (29 Stat. 599) (these are reproduced in Appendix C).

STATEMENT OF THE CASE

The original thirteen States created a constitutional union based on the States' sovereign equality. Among each State's sovereign rights is ownership of all lands beneath its navigable waters (sovereign lands). Since 1845, in *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212, this Court has applied principles known as the Equal Footing Doctrine. Thereunder, by operation of constitutional law each State, at statehood, takes title to its sovereign lands. Until statehood, those sovereign lands

are held in trust by the federal government for the future State. The State's title to sovereign lands can be defeated or diminished only by a pre-statehood act of Congress clearly conveying that land to meet some international duty or public exigency.

Prior to the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27, there was a widespread problem on public-domain lands. Land speculators, called "land-grabbers," were monopolizing some of the West's most valuable lands by preempting reservoir sites and other lands having particular irrigability or access to irrigation water. The speculators, acting as individuals, syndicates and corporations, seized these desirable lands for profit.[1]

Congress countered the problem with the relevant part of the 1888 Act, which authorized the United States Geological Survey ("USGS") to select and withdraw lands suitable for irrigation or reservoir sites. Those lands would then be preserved for future disposition, and would be safe from the speculators. The withdrawn lands were reserved from sale as property of the United States, were not subject to sale, entry, settlement or occupation, and could be homesteaded only by presidential proclamation. The Act did not refer to sovereign lands.

Utah Lake, a navigable body of water covering approximately 150 square miles and Utah's largest fresh-

[1] That this problem was the reason for the 1888 Act is shown in its legislative history, 19 Cong. Rec. 7012-7032, 8471, 8505-8513, and Appendix 496-498 (1888), and in the legislative history of amending legislation, e.g., 21 Cong. Rec. 7277, 7287, 7359, 7394, 7399 7771, 7981 and 9155 (1890), and Senate Report No. 928, pp. 169-70 (1890).

water lake, soon became entangled in USGS's withdrawal pursuits. In 1889, USGS purported to withdraw the bed of Utah Lake as a reservoir site together with all land within two statute miles of the lake's border. 780 F.2d at 1519 (App. 10a). The United States, however, never utilized the lake as a reservoir site.

On January 4, 1896, Utah obtained statehood, at which time, under traditional principles of constitutional Equal Footing, the State gained title to the beds of its navigable bodies of water. Thereafter, Utah exercised its ownership of the bed of Utah Lake through use, management, control,[2] and judicial declaration.[3]

In 1976, the Bureau of Land Management issued oil and gas leases on the lakebed, which Utah viewed as a violation of its sovereign rights. 780 F.2d at 1516 (App. 2a). Following unsuccessful negotiations, in May 1979 Utah filed this action in the district court, for declaratory judgment (that the 1889 withdrawal of Utah Lake did not deprive Utah of its title to the lakebed), to quiet title, and for confirmation of the State's title under the Submerged Lands Act, 43 U.S.C. 1311. Jurisdiction was asserted under 28 U.S.C. Sections 1331, 2201 and 2409a. In a memorandum opinion and order, App. 28a, the district court granted Respondents' motion for summary judgment and quieted title to the lakebed in the United States.

The Tenth Circuit affirmed, concluding that (1) since the 1888 Act did not expressly restrict the type of

[2] R. Vol. IV, Tabs A-K.

[3] See the Utah Supreme Court citations in note 4.

land USGS could select for reservoir sites, USGS was free to withdraw beds of navigable waters—including the bed of Utah Lake; (2) USGS withdrew the bed of Utah Lake in 1889, defeating Utah's title under the Equal Footing Doctrine; and (3) the Submerged Lands Act did not confirm title in Utah.

REASONS FOR GRANTING THE WRIT

The Equal Footing Doctrine is an important and fundamental constitutional guarantee of equality in State sovereign rights. Its basic principles have not changed since its first application by this Court over 140 years ago.

Unfortunately, those long-established principles do not prevail in the decision below. Instead, the lower court introduces severe changes that do grave damage to the Doctrine. By those changes Utah's sovereign title was denied; and by its nature the lower court's decision against State sovereignty is likely to affect many interests beyond those presented here.

The decision below clearly conflicts with decisions and settled principles of this Court, as reaffirmed in *Montana v. United States*, 450 U.S. 544 (1981), in that the lower court: (a) changes the established constitutional standard for determining whether sovereign title can be denied; (b) reverses the presumption this Court has established in favor of State sovereign title; (c) essentially eviscerates the United States' trust obligations regarding sovereign lands; (d) far exceeds the reach of this Court's holdings by denying the State's title on the basis of the

administrative withdrawal; (e) demotes sovereign lands to the status of public-domain lands; and (f) seeks to support its erroneous conclusions upon a statutory construction that is unsound for many reasons, including its inconsistency with this Court's precedents.

Of course, the State of Utah is most directly aggrieved by the lower court's abrupt modification of the law. Utah Lake is Utah's largest freshwater lake and an important natural resource whose ownership and control are of great consequence to the State. And the Utah Supreme Court has long recognized the State's ownership of the lakebed.[4]

But the harm of the decision below is not confined to Utah Lake. Public-lands States are encumbered with various kinds of federal administrative withdrawals; and the lower court's decision simply invites conflict and creates problems for those States and other circuits wherever such withdrawals involve sovereign lands.

The Tenth Circuit, which encompasses many of the States likely to generate these issues again, has signaled a substantial change in the standards and rules governing Equal Footing and sovereign lands. This is a significant case involving important constitutional issues that need this Court's review.

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[4] State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927); and Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947), on rhg. 111 Utah 68, 181 P.2d 213 (1947), and on second appeal after remand, 117 Utah 507, 217 P.2d 577 (1950). These cases, however, did not have the United States as a party and did not address the issues presented here.

I. THE LOWER COURT HAS DEPRIVED UTAH OF ITS SOVEREIGN TITLE IN UTAH LAKE BY APPLYING A STANDARD IN CLEAR CONFLICT WITH THE CONSTITUTIONAL STANDARD ESTABLISHED BY THIS COURT, BY REVERSING THE ESTABLISHED PRESUMPTION, BY EVISCERATING THE FEDERAL TRUST OBLIGATION, AND BY DEMOTING SOVEREIGN LANDS TO THE STATUS OF PUBLIC LANDS.

A. *The Constitutional Requirements*

The Equal Footing Doctrine holds that all States admitted to the Union possess the same rights and sovereignty as the original 13 States. *Smith v. Maryland,* 18 How. 71 (1855); *Utah v. United States,* 403 U.S. 9 (1971); *California, ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 281 n.9 (1982). The original States reserved the right to the beds of navigable waters and new States have the same right. *Pollard's Lessee v. Hagan,* 3 How. (44 U.S.) 212, 229, 230 (1845). A "State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977). As a result, the federal government holds sovereign lands (beds of navigable waters) in trust for future States. *Pollard's Lessee, supra,* at 222-23, 229; *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15 (1935).

As in any trust relationship, the United States, as trustee, is very restricted in what it may do with the trust property. In *Montana v. United States,* 450 U.S. 544

(1981), this Court reconfirmed that the federal government may dispose of a State's sovereign lands before statehood only for "some international duty or public exigency." *Id.* at 552.

Such a conveyance must not be lightly inferred. In fact, there is a *"strong presumption"* against such conveyances. *Id.* (emphasis added). Congress's intention to make the conveyance must be "definitely declared or otherwise made [very] plain," "in clear and especial words," or the valid muniment of title must "in terms embrace[] the land under the waters of the stream." *Id.* quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 411 (1842); and *Packer v. Bird*, 137 U.S. 661, 672 (1891). The Constitution erects such a high standard for deprivation of State title "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Id.*, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935).

The constitutional standard requires proof of a "public exigency." A "public purpose," even an entirely "appropriate" one, is not sufficient. *Montana*, 450 U.S. at 556.

In *Montana*, the United States, acting for the Crow Tribe, sued the State to quiet title to the bed of a navigable river. The question was whether the United States conveyed beneficial ownership of the riverbed to the tribe by virtue of two Indian treaties, or whether the United States had retained ownership of the riverbed, which then

passed to the State at statehood. In construing the treaties the Court determined that their provisions for Indian property rights were "not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." *Id.* at 554. The treaties did not expressly refer to the riverbed, *id.*, there was no international duty or public exigency, *id.* at 556, and Montana was held to own the riverbed.

The State won despite "the unique legal status of Indian tribes under federal law" that gives Congress a "unique obligation toward the Indians," which often has been the basis for valid legislation giving Indians "special treatment," *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974); and despite this Court's practice of resolving doubts in Indian treaties in favor of the Indians. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). *Montana* shows the invariable applicability of the "strong presumption" against federal conveyance of a State's sovereign entitlement. And it speaks a fortiori in favor of Utah's position here, because in this case the United States has no special responsibility, like the Indian trust-relationship, that could be claimed to override its constitutional obligation to hold sovereign lands in trust for the State.

B. *The 1888 Act*

The Sundry Appropriations Act of 1888 ("Act") was heavily relied on by the lower court. To demonstrate how the constitutional standard applies in this case, we quote the relevant part of the Act:

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. . . . *And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law*: *Provided,* That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

25 Stat. at 526-527 (emphasis added).

The Act speaks for itself. Or perhaps more aptly, the Act is dispositively silent. The Constitution sustains State sovereign title unless the subject legislation (a) clearly, definitely and specifically expresses (b) the need for sovereign lands (c) to meet some international duty

or public exigency.[5] Nothing in the Act meets that test. Nothing here counteracts the "strong presumption" of State title.[6]

A principal reason this Court upheld the State's title in *Montana* was the fact that the Indian treaties made no reference to sovereign lands. 450 U.S. at 554. The same is true in Utah's case; the 1888 Act also does not include sovereign lands. But unfortunately (as we discuss hereafter), the Tenth Circuit failed to follow *Montana*. Instead, the lower court gave directly opposite effect to the fact this Court relied on; it deprived Utah of title *because* the Act did not refer to sovereign lands. 780 F.2d at 1521 (App. 15a). That illustrates the Tenth Circuit's reverse presumption.

Montana emphasizes the requirement of clarity and definiteness. Since the *Montana* treaties were held to lack the specificity and clarity necessary to include sovereign lands, the same must hold a fortiori in Utah's case because the 1888 Act contains even less basis for inferring a reference to sovereign lands. By comparison, the treaties were models of clarity and site-specificity.

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[5] Hereinafter, since the Act unquestionably is not tied to any international duty, we discuss this branch of the constitutional standard by referring only to "public exigency."

[6] Construction of the Act in favor of State title is further indicated in that by 1888 Congress was aware of the federal government's trust obligations toward the future States' sovereign lands, and of the substance of the presumption in favor of State title. **Montana,** 450 U.S. at 552 n.2; Martin v. Waddell, 16 Pet. 367 (1842); Pollard's Lessee v. Hagan 3 How. 212 (1845); and Smith v. Maryland, 18 How. 71 (1855). If Congress actually had intended to override traditional State ownership of Utah Lake and other sovereign lands, it would have been much clearer about it.

For example, the treaties created a special reservation, specifically detailed its land and boundaries, and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians . . . ." *Montana*, 450 U.S. at 553. In Utah's case, the 1888 Act was less specific. It contemplated no particular land, and referred only broadly to "the arid region of the United States."

The treaty provided that the United States "solemnly agrees" that no one but designated government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. *Id.* at 553-54. Without similar specificity in referring to affected lands, the 1888 Act provided that selected lands would be "reserved from sale" and "not be subject . . . to entry, settlement, or occupation . . . ."

Like the treaties, the 1888 Act contains no language construable as an inclusion of sovereign lands, and "is not strong [nor clear, nor specific] enough to overcome the presumption against" any pre-statehood conveyance of the lakebed. *Id.* at 554.

It is already clear that the 1888 Act does not overcome *Montana*'s strong presumption for State title, but there is additional affirmative support for the State's position, which we briefly discuss.

The Act shows that Congress never intended it to interfere with State sovereign lands. The public domain and sovereign lands are entirely distinct, the latter not being subject to public selection, settlement or entry, etc.,

under the public-land laws.[7] The Act consists of public-land-law terms, and its silence on sovereign lands comports with Congress's purpose of remedying a problem that affected only public-domain lands.

Valuable irrigable public lands and reservoir sites were being monopolized by speculators. The "land-grabbers" were using the land laws to take control of the most useful lands by sending "their agents in after the surveyor and . . . seizing upon the lands wherever the source of water supply for irrigation was found." 21 Congressional Record 7394 (1890) (remarks of Sen. Reagan).[8] Thus they were excluding others from using these public lands—and it was happening on an alarming scale.

The 1888 Act was the intended remedy. It authorized USGS to make appropriate withdrawals, which

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[7] The Act provides that all lands USGS was authorized to select for reservoir or irrigation purposes were "reserved from sale as the property of the United States, and shall not be subject . . . to entry, settlement or occupation," and were open to homesteading only by presidential proclamation.

Several cases show that " 'public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning. . . ." Barker v. Harvey, 181 U.S. 481, 490 (1901). "Public lands" are those "subject to sale or other disposal under general laws." Id., quoting Newhall v. Sanger, 92 U.S. 761, 763 (1875). "Specifically, the term 'public lands' [does] not include tidelands." Borax, Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935), citing Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894). The State's title in sovereign (submerged) lands "is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale." Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

[8] Senator Reagan, the author of the 1888 Act, gave this explanation of the Act's purpose during debate over 1890 legislation that was passed to repeal the 1888 Act. That was only one of many similar expressions in Congress. The repeal was necessary because of USGS's overzealousness.

would stop the speculation and monopolization and preserve those lands for future disposition. The Act was silent about sovereign lands, and naturally so, since they were not associated with the problem the Act was addressing. Sovereign lands were not affected by the "land-grabbing," which was being done on public lands under the public-land laws.

The 1888 Act countered the land-grabbing, but soon became the unanticipated basis for another problem. USGS, apparently striving to do all it could with the authority it presumed to have under the Act, soon had withdrawn great amounts of land. Now the public outcry was that USGS, rather than private land-grabbers, was thwarting settlement. *E.g.*, 21 Cong. Rec. 9155 (1890).

In 1890, Congress reacted to those administrative excesses by repealing the 1888 Act and curtailing USGS's activity. The 1890 act[9] and later legislation[10] confirmed that the 1888 Act had authorized the withdrawal of only

[9] The 1890 legislation, 26 Stat. at 391, provided that "so much of [the 1888 Act] as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed . . . ." See also next note.

[10] Further legislation, in 1891, 26 Stat. 1101, supports the 1888 Act's unmistakable pertinence only to public lands. The 1890 act had provided that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided for by said [1888] act . . . ." Id. at 391. The 1891 act corrected another aspect of USGS's earlier excesses by providing that the reservoir sites were restricted to "only so much land as is actually necessary for the construction and maintenance of reservoirs . . . ." Each of the 1890 and 1891 acts was tied explicitly to the terms of the 1888 Act, and did not purport to expand any authority under that Act. The 1897 legislation relating to the use of reservoir sites, 29 Stat. 599, referred to the 1891 act. None of the acts professed, in clear and define terms or otherwise, to authorize or support the withdrawal of sovereign lands.

"public lands." Congress had never conceived that sovereign lands would be affected, and clearly did not authorize USGS to withdraw the bed of Utah Lake. The lower court's contrary inferences oppose the analytical prescriptions of *Montana*.

Of course, even if there had been some purported inclusion of sovereign lands, the State's entitlement would yet be safe unless, in addition, it could be demonstrated that the Act clearly and properly included the particular sovereign land to meet some public exigency. Utah Lake is not so affected here.

Having examined the constitutional standards as applied in *Montana* and to the 1888 Act, we next turn to the lower court's misapplication thereof.

C. *The Decision Below*

The Tenth Circuit's decision, contrary to the principles of the venerable line of cases this Court recently reaffirmed in *Montana*, denied the State's title despite the Act's lack of clear reference to sovereign lands and public exigency. The lower court acknowledged this Court's standard (780 F.2d at 1518-19; App. 6-9a), but immediately abandoned it for a substantially lesser one.

With respect to public exigency, the court was "satisfied that the withdrawal of Utah Lake, including its bed, was made for a *public purpose motivated* by a public exigency. . . ." 780 F.2d at 1524 (App. 23a) (emphasis added). The lower court located a "public purpose" in the 1888 Act's facilitation of irrigation. *Id.* But

such a public purpose is immaterial in this context. Since the Act presents no "public exigency," there is no constitutional basis for overriding the Equal Footing Doctrine. *Montana*, 450 U.S. at 556.

"A public purpose motivated by a public exigency" is a substantial dilution of the true standard, and indicates that the lower court will deny sovereign title upon tentative, tenuous, and indirect bases. That is what happened below. It does not follow that the State's title should be (or was intended to be) denied simply because Congress wanted to facilitate irrigation. Regardless of who owned the lakebed, it would be covered with water; and State ownership of the lakebed would not change the water's availability for irrigation.[11] The United States clearly did not need the lakebed to meet Congress's concern. Since it has no basis in a "public exigency," the decision below must be corrected.

We must also briefly discuss how the lower court violated the constitutional standard and presumption by not requiring a clear and definite legislative reference to sovereign lands. Because the *Montana* treaties lacked such expression, the State prevailed. The 1888 Act also lacks any such expression; but the lower court, failing to follow *Montana*, embarked on its own approach; one that reverses the established presumption.

Rather than presuming State ownership, the lower court proceeded from the opposite premise that since

[11] Irrigation from Utah Lake certainly has proceeded orderly and fairly under Utah water law, and has done so irrespective of considerations of lakebed ownership.

sovereign lands were not expressly *excluded* (because the Act is silent about them), the State could not own the lakebed. 780 F.2d at 1521 (App. 15a). The Tenth Circuit, unwittingly or not, has imposed a reverse presumption.

The ramifications of the lower court's mistake are dramatic. Of course, the reversed presumption is itself extremely significant, and calls for immediate correction. But in addition, the decision below effectively wipes out the distinction between sovereign lands and public-domain lands, a distinction maintained by the Constitution under the Equal Footing Doctrine.

As shown above, the Act did not refer to sovereign lands; it pertained only to public-domain lands. (*See ante* note 7.) By holding that the Act applied also to sovereign lands, the lower court treats both classes of land absolutely alike. This disparagement would remove sovereign lands from trust and place them in the realm of public lands, to become open to general entry and use. It would greatly demote Utah in relation to its sister States, deprive it of its constitutional due, and deny it the benefits of owning and controlling the natural resources of Utah Lake. These problems are not merely theoretical, as is evidenced by BLM's 1976 issuance of leases on the lakebed.

The decision below abandons the established "strong presumption" and this Court's "clarity and definiteness" standard, and relies instead on baseless implication.[12]

[12] Montana does not allow deprivation of sovereign title by implication, but only by express reference. United States v. Aranson, 696 F.2d 654, 664 (9th Cir. 1983).

The flaw in the lower court's approach is apparent. Clear, definite legislation should not need interpretation by implication; and legislation unclear or indefinite with respect to sovereign lands cannot defeat State title. *Montana,* 450 U.S at 554. Since sovereign lands are not clearly and specifically referred to by the 1888 Act, it (and a fortiori any implication derived from it) lacks the force and focus necessary to invade the aegis of constitutional Equal Footing.[13]

The Tenth Circuit's decision is contrary to *Montana,* applies a new standard, and violates Utah's Equal Footing entitlement.

II. THE DECISION BELOW RAISES FUNDAMENTAL AND UNRESOLVED QUESTIONS BY DENYING UTAH'S TITLE ON THE BASIS OF THE 1889 ADMINISTRATIVE WITHDRAWAL.

We showed above that the 1888 Act did not authorize deprivation of State sovereign lands. That being true, the lakebed's 1889 administrative withdrawal, depending as it must on the Act for its authority, perforce

[13] The tenuity of the decision below is reflected further in its reliance on "documents compris[ing] [USGS's] contemporaneous interpretation and understanding of the scope" of that agency's own action. The court concluded therefrom that USGS actually intended to withdraw the bed of Utah Lake. 780 F.2d at 1520 (App. 13a). We need not debate USGS's intentions, for they are irrelevant if the agency had no authority. Congress's intent in the 1888 Act is at issue here. The cases the lower court cites (**Choctaw Nation** and **Udall**) do not require deference to an agency's understanding of its own actions where those actions are taken without statutory authority. Since the treaties were insufficient to overcome State title in **Montana**, clearly the administrative documents in this case cannot suffice.

could not have defeated the State's title. The lower court's contrary conclusion raises additional disquieting questions that need this Court's attention.

To our knowledge, this Court has never allowed a State's Equal Footing entitlement to be denied except upon a final conveyance of federal title, and indeed a conveyance authorized by Congress and proved under the constitutional standard.[14] The reservoir site withdrawal is not enough.[15]

This is an important issue. Federal withdrawals and reservations are common and widespread throughout the West, and do affect sovereign lands, as is evidenced by the instant case and others.[16] States need to know

[14] By this we mean to include also any situation where the United States had no title to which the State could succeed. **E.g.**, Knight v. United Land Ass'n., 142 U.S. 161 (1891) (title under Mexican grants pre-dating territorial acquisition by the United States remains secure as against the state and federal governments). The cases are few and easily distinguishable in which this Court has found that the constitutional standard has been satisfied for a denial of State title. But to our knowledge, all of those cases, too, involved title conveyances. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (The United States **conveyed fee title** to the tribe. As **Montana** discusss (at 555 n.5), that the Choctaw Nation prevailed against the State's title "is a singular exception" to established law, and was "based on very peculiar circumstances not present in this case."); **Knight, supra.**

[15] Even **assuming** that the withdrawal was authorized and valid, it did nothing more than reserve a reservoir site. That is not inconsistent with State title in the lakebed, including ownership of the mineral estate, etc. The administrative withdrawal is not tantamount to a conveyance of the United States' title.

[16] It is one of many issues in **United States v. State of Alaska** (No. 84, Original), presently pending in this Court before a special master.

whether the Constitution permits the defeat of sovereign State title by mere administrative withdrawal.

It is, after all, *Congress's* pre-statehood intention to *convey* sovereign lands that, if definitely expressed and for a public exigency, will defeat a State's title.[17] "A [federal] reservation . . . cannot operate to escalate the underlying claim of the United States to the land in question." *United States v. California*, 436 U.S. 32, 41 (1978).[18] That is appropriate. Nothing but compelling needs giving rise to definitely-expressed final conveyances (by which the federal government's title is clearly extinguished, leaving nothing for the State to succeed to) should ever be the basis for denying a State's Equal Footing entitlement.

The 1888 Act lacked expression of any intention to convey sovereign lands, and "no unexpressed and unsuggested intention should be attributed to Congress—certainly no intention to make the people of the State . . ., who otherwise would receive these [sovereign] lands for their general benefit, suffer . . . ." *Mann v. Tacoma Land Co.*, 153 U.S. 273, 285, 286 (1894). Yet, the decision below went beyond the Act, even beyond the 1889 withdrawal, to examine "other [later] agency documents surrounding the withdrawal." 780 F.2d at 1519 (App. 11a). The inferences the lower court sought in that collage of administrative papers certainly do not satisfy the requirements for defeating Utah's title.

[17] As stated in **Montana**, "Congress may sometimes convey lands below . . . a navigable water," provided the requisite tests are met. 450 U.S. at 551 (emphasis added).

[18] In **California**, the Court upheld the State's title to the submerged lands within the Channel Islands National Monument, situated within the three-mile marginal sea. The sentence quoted in the text referred to a national monument reservation, which was held to be no basis for federal title under the Submerged Lands Act, 43 U.S.C. 1313(a). It involved a post-statehood reservation of lands that before the Submerged Lands Act were clearly federal. 436 U.S. at 33-34 and n.3.

Because "Congress had made no provision for" withdrawals of sovereign lands, USGS's intentions and actions, "no matter with what seeming regularity the forms of law may have been observed," do not validate the 1889 withdrawal of Utah Lake. *Borax, supra*, at 18, quoting from *Smelting Co. v. Kemp*, 104 U.S. 636, 641 (1881). USGS was simply without jurisdiction or competency to defeat sovereign title. *Id.*

The decision below stands in stark contrast to the standards, presumption and analysis this Court has demanded of any attempt to override a State's sovereign entitlement. By denying State title on such attenuated grounds, the lower court has reached around the "strong presumption" and plowed inroads into constitutional Equal Footing.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APRIL 25, 1986

APPENDIX A

The STATE OF UTAH, By and Through its DIVISION OF STATE LANDS, Plaintiff-Appellant,

v.

UNITED STATES of America; William P. Clark, Secretary of the Department of the Interior; Robert F. Burford, Director of the Bureau of Land Management within the Department of the Interior; and Roland G. Robison, Jr., Utah State Director of the Bureau of Land Management; Defendants-Appellees.

No. 83-1731.

United States Court of Appeals,
Tenth Circuit.

Dec. 26, 1985.

Dallin W. Jensen, Sol. Gen. of the State of Utah (David L. Wilkinson, Atty. Gen. of the State of Utah, Michael M. Quealy and R. Douglas Credille, Asst. Attys. Gen., Salt Lake City, Utah, were also on the brief), for plaintiff-appellant.

Lois J. Schiffer, Atty., Dept. of Justice (F. Henry Habicht, II, Asst. Atty. Gen., Washington, D.C., Brent D. Ward, U.S. Atty., Salt Lake City, Utah, Dirk D. Snel, Steven A. Herman, and Lawrence W. Puckett, Attys., Dept. of Justice, Washington, D.C., were also on the brief), for defendants-appellees.

Before HOLLOWAY, Chief Judge, and DOYLE and LOGAN, Circuit Judges.

HOLLOWAY, Chief Judge.

The State of Utah timely appeals from a summary judgment quieting title in the United States to the bed of Utah Lake, located in Utah County, Utah. Judgment was entered on the theory that the United States withdrew the lakebed as part of an 1889 reservoir site selection, and that title did not pass to the State of Utah under the equal footing doctrine when Utah became a State in 1896, and that title to the lakebed did not pass to the State under the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1343. — F.Supp. — (D.Utah 1985).

We affirm.

I

The factual background

As noted in Utah's brief, the controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of the Interior began to issue oil and gas leases on the bed of Utah Lake[1]—an act that the State viewed as a violation of its ownership and property rights to the bed of Utah Lake. Appellant's Brief 2; *see also* I R. 39, 48. Following unsuccessful efforts to resolve the conflicting claims, the State initiated this action to quiet title.

[1] For a general description of Utah Lake, see **Utah v. Marsh, 740 F.2d 799, 800-01 (10th Cir. 1984)**.

In its complaint the State claimed that on January 4, 1896, by virtue of the State's admission into the Union on an equal footing with all other states, the State of Utah became the owner, and has ever since been the owner, of the bed of Utah Lake, a navigable body of water located wholly within the State. I R. 1-2. Utah Lake is the largest freshwater lake in the State, with a surface area of approximately 150 square miles. *Marsh*, 740 F.2d at 800.

By way of an amended complaint, the State alternatively claimed that if for any reason it did not obtain title to the bed of Utah Lake at the date of statehood, it obtained full title thereto, including all natural resources in the bed and waters of such lake, on or about May 22, 1953, by virtue of the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, and particularly § 1311(a). I R. 40. The State requested the court to adjudicate and declare the State of Utah to be the owner of the bed of Utah Lake and the natural resources associated therewith and also requested that the court enjoin defendants from interfering with Utah's ownership and managment. I R. 2-3, 40.

By way of answer, defendants denied all of Utah's ownership claims to the bed of Utah Lake. I R. 10-11, 47-48. Defendants asserted that title to the bed of the lake had remained in federal ownership by virtue of a reservoir site selection on April 6, 1889, by then Director of the United States Geological Survey, J. W. Powell, and that the State received no title to the lands in question by virtue of the Submerged Lands Act. I R. 97-98. Defendants further claimed, as a procedural and jurisdic-

tional matter, that any legal challenge regarding the effect of the 1889 withdrawal on the title to the bed of Utah Lake had to be brought under the Quiet Title Act, 28 U.S.C. § 2409a, by the party disputing the title of United States, and that any action brought under the Quiet Title Act by plaintiff was barred by the statute's 12-year limitation period in §2409a(f). I R. 97.

Cross-motions for summary judgment were filed. After a hearing, the district court issued its Memorandum Opinion and Order observing as an initial matter that the parties were in dispute regarding the procedure by which the case had come before the court, with plaintiff insisting that the suit was one for a declaratory judgment and defendants maintaining that it was a quiet title action; however, the court declined to resolve this jurisdictional dispute, ruling that either theory gave it the opportunity to examine the merits of the case.[2] II R. 332.

[2] The United States notes in its brief, Brief for the Appellees 9 n. 4, that after the district court issued its Memorandum Opinion and Order in this case, the Supreme Court handed down an important decision on the Quiet Title Act, 28 U.S.C. § 2409a, in **Block v. North Dakota ex rel. Board of University of School Lands**, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). In **Block** the Court ruled that Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property, and that the States must fully adhere to the twelve-year limitation period in § 2409a(f) when suing the United States. **Id.** at 282-90, 103 S.Ct. at 1817-22.

We agree that under **Block**, the present action must be characterized as one for quiet title, and not as one for declaratory judgment, as the trial court apparently thought. The statute of limitations provided by 28 U.S.C. § 2409a is not an issue on this appeal. The Government states in note 4 in its brief before us that the district court rested its finding of Quiet Title Act jurisdiction in part on the factual determination that the 12-year statute had not run; and because the court of appeals would only reverse such a finding if it were clearly erroneous, the Government has not challenged the ruling that the district court had Quiet Title Act jurisdiction to decide the case.

Turning to the merits, the district court found that the United States withdrew the bed of Utah Lake as part of the 1889 reservoir site selection, as revealed by language used in the correspondence and documents surrounding the 1889 withdrawal. The court further found that the withdrawal of Utah Lake was made after the United States acquired the territory, and before the State of Utah was created, for the appropriate public purpose of providing irrigation for future settlers of the arid west; thus, the United States' title in the area was not cut off by the subsequent creation of the State and the application of the equal-footing doctrine. Finally, the court rejected the State's contention that it obtained title to the bed of Utah Lake under the Submerged Lands Act, ruling that the bed of Utah Lake was excluded from the application of that Act by way of the exception provided in § 1311(a) for land retained by the United States before statehood. The court denied plaintiff's motion and granted defendants' motion for summary judgment.

On appeal, the issues presented are (1) whether the pre-statehood reservoir site withdrawal by the United States on Utah Lake prevented the State of Utah from acquiring title to the bed of Utah Lake as a matter of constitutional equal-footing, and (2) whether the Submerged Lands Act confirms any interest in the bed of Utah Lake in the State of Utah. Appellant's Brief 1-2.[3]

[3] The United States points out that a large part of Utah's brief discusses opinions and actions by State and Federal officials who may have thought or assumed that Utah owned the bed of Utah Lake, and states that if the State is implicitly arguing an estoppel theory, that theory should be rejected. Brief for the Appellees 37-40. However, the propositions as stated in the briefs filed for the State do not actu-

II

The equal-footing doctrine

In *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 145, 88 L.Ed.2d 120 (1985), we stated:

> The equal footing doctrine embraces the precept that each state is equal in power, dignity, and authority, and that a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was admitted to the Union; any conditions imposed by Congress would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Coyle v. Smith*, 221 U.S. 559, 567, 573, 574 [31 S.Ct. 688, 690, 692, 693, 55 L.Ed. 853] (1911).

In *Montana v. United States*, 450 U.S. 544, 551-52, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981), the Supreme Court summarized the basic principles of the equal-footing doctrine in issue here as follows:

> As a general principle, the Federal Government holds [lands under navigable waters] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v.*

[3] Continued
ally urge an estoppel theory and at argument counsel for the State said the State is not arguing an estoppel. Accordingly, we do not reach that issue.

Hagan, 3 How, 212, 222-223, 229 [11 L.Ed. 565]. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14 [55 S.Ct. 610, 615, 79 L.Ed. 1267]. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water,

> "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby*, 152 US. 1, 48 [14 S.Ct. 548, 566, 38 L.Ed. 331].

But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, supra, [295 U.S.] at 14 [55 S.Ct. at 615] it will not not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., [49] at 55 [46 S.Ct. 197, 199, 70 L.Ed. 465]. See also *Shively v. Bowlby*, supra, [152 U.S.] at 48 [145 S.Ct. at 199]. A court deciding a question of title to the bed of a navigable water must, therefore,

begin with a strong presumption against conveyance by the United States, *United States v. Oregon*, supra, [295 U.S.] at 14 [55 S.Ct. at 615], and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank*, supra, [270 U.S.] at 55 [46 S.Ct. at 199], or was rendered "in clear and especial words," *Martin v. Waddell*, supra, [16 Pet. 367] at 411, [10 L.Ed. 997], or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird*, supra, [137 U.S. 661] at 672 [11 S.Ct. 210, 212, 34 L.Ed. 819].

Although the Court in *Montana* referred specifically to pre-statehood conveyances, the same principles also apply to pre-statehood reservations or withdrawals by the United States. *See United States v. City of Anchorage, State of Alaska*, 437 F.2d 1081, 1084-85 (9th Cir. 1971); *United States v. Alaska*, 423 F.2d 764, 766-68 (9th Cir.), *cert. denied*, 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed. 2d 388 (1970).

Here there is no dispute that Utah Lake is a navigable body of water.[4] The question is whether the pre-

[4] The pretrial order reflects that the following statement of facts was agreed on by the parties (I R. 98):

> B. On January 4, 1896, (the date of Utah's statehood) Utah Lake was "navigable-in-fact" under federal law and was susceptible of being used, in its ordinary condition, as a highway of commerce over which trade and travel may have been conducted in the customary modes of trade and travel on water, all within the meaning of The Daniel Ball, 10 Wall. 557, 563 [19 L.Ed. 999] (1870), as interpreted and applied in United States v. Holt State Bank, 270 U.S. 49 [46 S.Ct. 197, 70 L.Ed. 465] (1926); United States v. Utah, 283 U.S. 64 [51 S.Ct. 438, 75 L.Ed. 844] (1931); and Utah v. United States, 406 U.S. 484 [92 S.Ct. 1691, 32 L.Ed.2d 246] (1972).

sumption under the equal-footing doctrine—that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty—has been overcome by some "definitely declared" or "plain" intent to withdraw the bed of Utah Lake "because of 'some international duty or public exigency.' *Montana*, 450 U.S. at 552 [101 S.Ct. at 1251] (quoting *Holt State Bank*, 270 U.S. at 55 [46 S.Ct. at 199])." We now will examine the scope of the 1889 reservoir site selection, the statutory authorization for that selection, and the purposes for which the selection was made.

A

The 1889 reservoir site selection

The selection of Utah Lake as a reservoir site was made in 1889 by John Wesley Powell, then Director of the United States Geological Survey (U.S.G.S.), under the provisions of the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27.[5] In a report to the Secretary of the

[5] The Sundry Appropriations Act provided in part as follows:

> FOR GENERAL EXPENSES OF THE GEOLOGICAL SURVEY: . . .
>
> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid regions, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey under the supervision of the Secretary of the Interior shall

Interior, dated April 6, 1889, Director Powell wrote:

> I have the honor to report that *the site of Utah Lake* in Utah County in the Territory of Utah is hereby selected as a reservoir site, *together with all lands situated within two statute miles of the border of said lake at high water*.
>
> Pending the more accurate designation of the boundaries of the foregoing site by township, section and quarter-section lines, I respectfully recommend that the Register of the Land Office at Salt Lake City be instructed to refuse further entries of public land within the foregoing prescribed limits.
>
> I venture to add that speedy action should be taken in this matter as any further entries of the lands adjoining Utah Lake will have a tendency to defeat the purposes of the law and obstruct the use of the lake as a natural reservoir for the irrigation of lands below its outlet.

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[5] **Continued**

> make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoires [sic] and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

25 Stat. 505, 526-27.

I R. 142-43 (reprinting letter from Director of the Geological Survey to the Secretary of the Interior) (emphasis added).

Utah asserts that the 1889 reservoir site selection did not include the bed of Utah Lake because Director Powell's report does not specifically or unambiguously refer to the bed of Utah Lake or its minerals. Appellant's Brief 24-25. However, when the report is read together with other agency documents surrounding the withdrawal, we feel that the intentions of the U.S.G.S. are made sufficiently clear. For example, when informing Congress of the reservoir site selection in its Tenth Annual Report, the U.S.G.S. included the following description of the hydrographic work in Utah:

> In April Mr. Newell was sent to Utah to make certain examinations of Utah Lake with reference to its capacity for a reservoir site and to furnish the specifications for its withdrawal as such under the law, so far as *the lands covered* or overflowed *by it* or the lands bordering upon it *were still public lands*.

I R. 151 (reprinting *Tenth Annual Report, supra,* at 88). (emphasis added).

Even more telling is the agency's express reference to the bed of Utah Lake in its Eleventh Annual Report:

> In Utah, in addition to the general reconnaissance of the storage facilities at the headwaters of the Sevier River and other streams, a careful survey was made of Utah Lake. This survey, run by level and transit

around the lake, was for the purpose of determining the area which would be covered by damming or holding back the flood water. A description of the location and physical features of this body of water is to be found in this report under the head of Hydrography, and it will suffice to state here that after a careful study it was found that, on account of the excessive evaporation from such an enormous surface, the lake was too large to act in an economical manner as a storage reservoir. On the other hand, while it may not be advisable to hold back the water to a point above that of the average height, yet there is sufficient evidence to show that natural forces at times may raise the water level and increase the area to abnormal proportions by backing water over the great fringing marshes on the east and south. This land being, therefore, the natural flood ground of the lake should be reserved up to the high-water line. *Accordingly, the segregation, as shown on Pl. XCV and given in the following lists, was made to include not only the bed but the lowlands up to mean high water.*

I R. 153-54 (reprinting Eleventh Annual Report of the United States Geological Survey to the Secretary of the Interior 1889-90, Part II Irrigation 183-84) (emphasis added).

Finally, the agency stated in its Twelfth Annual Report:

> [T]he lake is in effect too large to be most effective as a storage reservoir. . . .

> [T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent. . . .
>
> Thus, while to obtain the maximum amount of water in years of scarcity it would be better if the lake were small, yet to take care of the floods, which will happen at intervals of from five to ten years, it is necessary that the lake have a flood area as large as it now has, or even what it would have at the highest water. From consideration of these points *the segregation of the land around and under the lake was made* to a contour line which should be 5 feet above the low-water mark of 1879.

Twelfth Annual Report of the United States Geological Survey to the Secretary of the Interior 1890-91, Part II —Irrigation 339 (emphasis added) (citation omitted).

The language of these documents reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection. These documents comprise the involved agency's contemporaneous interpretation and understanding of the scope of the selection which were not unreasonable and as such are entitled to deference. *See Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970); *Udall v. Tallman,* 380 U.S. 1, 16-18, 85 S.Ct. 792, 801-02, 13 L.Ed.2d 616 (1965).

B

Congressional Authorization

1. *The Sundry Appropriations Act of 1888*

Utah argues that even if the 1889 reservoir site se-

lection included the bed of Utah Lake, that selection was not valid because Congress did not authorize withdrawal of the lakebed under the Sundry Appropriations Act of 1888. Appellant's Brief 25; Appellant's Reply Brief 6. Specifically, Utah argues that the 1888 Act merely provided that, once selected, reservoir sites located in the public domain were withdrawn from sale and were not thereafter open to entry, settlement, or occupation until further provided by law. The State asserts that beds of navigable waters were not legally or physically subject to any type of private entry or sale as property of the United States, and therefore were not covered by the Act's withdrawal provisions. Appellant's Brief 22-23; Appellant's Reply Brief 6.

The 1888 Act provides:

> [A]ll the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law. . . .

25 Stat. 505, 526-27.

The State would have us read the Act's proscription on "entry, settlement or occupation" of lands selected under the Act as excluding the beds of navigable waters. However, by its terms the statute provides broadly that

"all the lands which may hereafter be designated or selected . . . for sites for reservoirs . . . for irrigation purposes" were to be thenceforth "reserved from sale as the property of the United States," as well as not being "subject . . . to entry, settlement or occupation." *Id.* The statute thus imposes no restriction on the U.S.G.S's selection authority on the type of lands that could be designated or selected. We find no merit in the contention that the terms of the Act excluded the beds of navigable waters from lands that could be selected under the Act.

2. *Subsequent Congressional Action*

Utah points out that after the 1885 Act was passed, the U.S.G.S. proceeded to withdraw vast tracts of land as potentially irrigable or for reservoir sites, causing a furious outcry in the West, including charges that the U.S.G.S. was attempting to prevent further settlement. Utah states that discontent with existing large reservoir site withdrawals led to the enactment of various amendments to the 1888 Act which, it says, had the effect of restricting the 1889 withdrawal on Utah Lake. Utah asserts that the trial court in its opinion failed to address or take into account the effect of these amendments on the original 1889 withdrawal of Utah Lake. Appellant's Brief 24.

Congress amended the 1888 Act several times—in 1890, in 1891, and in 1897.[6] However, on none of these

[6] More recently, the 1888 Act was amended by § 704(a) of the Federal Land Policy Management Act of 1976, 43 U.S.C. § 662, to provide that:

> Sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the

occasions did Congress modify or rescind the withdrawal of Utah Lake including its bed. In the Act of August 30, 1890, 26 Stat. 371, 391, Congress repealed the 1888 provision "*except* that *reservoir sites heretofore located or selected* shall remain segregated and reserved from entry or settlement as provided by said Act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof." (Emphasis added). In the Act of March 3, 1891, 26 Stat. 1095, 1101-02, Congress restricted the location and selection of reservoir sites to "only so much land as is actually necessary for the construction and *maintenance* of reservoirs . . . . ," and also provided for rights-of-way through public lands and reservations of the United States to canal or ditch companies formed for the purpose of irrigation provided "[t]hat no such right of way shall be located as to interfere with the proper occupation by the Government of any such reservation . . . ." Finally, in the Act of February 26, 1897, 29 Stat. 599, Congress provided that:

> [A]ll reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act

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[6] **Continued**

> prevention of floods and overflows, located or selected prior to August 30, 1890, shall remain segregated and reserved from entry, or settlement, until otherwise provided by law, and reservoir sites thereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

43 U.S.C. § 662. Thus, the recent amendment does not affect the validity of the Utah Lake reservoir site selection, and no argument to that effect is made by the State of Utah.

> of March Third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

See generally California v. United States, 438 U.S. 645, 659-63, 98 S.Ct. 2985, 2993-95, 57 L.Ed.2d 1018 (discussing 1888 Act and amendments as background to Reclamation Act of 1902).

We are not persuaded that any of the legislation relied on by the State modified or overrode the effect of the Utah Lake reservoir site selection.

3. *Legislative History of the Amendments*

Utah's brief reviews in considerable detail selected portions of the legislative history of the amendments and asserts that this history is relevant to ascertain not only the intent of Congress regarding those amendments, but also that concerning the 1888 Act itself, citing *Andrus v. Shell Oil Co.,* 446 U.S. 657, 668-671, 100 S.Ct. 1932, 1939-41, 64 L.Ed.2d 593 (1980), and *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371 (1969), *inter alia.*

Relying on statements made during the floor debates of the 1890 amendment, Utah argues that the 1888 Act was passed for a very limited purpose—to control the rampant speculation and monopoly then going on in the West—and that Congress intended only *temporarily* to withdraw such lands until it could act to ensure that those making entry under public land laws for reservoir sites and irrigation purposes would occupy and develop the land in a fair and orderly fashion; and by their nature, beds of navigable waters simply could not have been a part of the problem Congress wanted to remedy. Appellant's Brief 26-30 (quoting statements of Sen. Reagan and Rep. Cogswell, 21 Cong.Rec. 7359, 7399, 7771 (1890)); Appellant's Reply Brief 7.

Utah also maintains that in authorizing the withdrawal of reservoirs sites, Congress intended that such reservoir sites located around natural navigable lakes withdraw only the adjacent uplands that might be inundated, not the bed of the natural water course. It says that the primary concern here was that if settlers entered and claimed lands in close proximity to a natural lake, they would have to be compensated if the reservoir later inundated their land. Therefore, Utah argues, it would be illogical to assume that Congress could have intended to withdraw the beds of lakes which were already covered by water. *Id.* at 32-34 (quoting statements of Sen. Jones, 21 Cong.Rec. 7386, 8327 (1890)).

We are not persuaded by either of these arguments. First, the plain language of the statute refutes the state's claim that the legislative history of the amendments demonstrates that reservoir site withdrawals were only "temporary," not permanent. In the 1888 Act, the reservoir sites were reserved by the United States "until further provided by law," 25 Stat. 505, 526-27, and thus the statute itself provided for the possibility of non-temporary withdrawals.

Second, the State's argument that Congress intended only that the adjacent uplands surrounding natural navigable lakes be withdrawn as reservoirs, assumes that Congress was concerned in every instance with those uplands that might be inundated if and when the water level was raised. We feel that assumption is unwarranted. The 1888 Act places no such limitation on the U.S.G.S.'s withdrawal authority, and, as noted earlier, the agency's contemporaneous understanding of the statute was that it authorized the selection of Utah Lake, including its bed. Moreover, although officials of the U.S.G.S. initially thought that the water level of Utah Lake should be raised, subsequent studies indicated that the water level should be lowered below the natural shoreline. In testimony before the Select Committee on Irrigation and Reclamation of Arid Lands, F. H. Newell of the U.S.G.S. stated:

> I came here in March, and began first a survey of Utah Lake. I made a careful survey of the shore lines and the amount of land that would be overflowed by raising the lake according to the wishes of the people.
>
> . . . .
>
> . . . At first it was thought necessary to raise the lake in order to get more water, but on more careful

study I think the lake can perform its full functions best by drawing down below the natural shore lines, rather than by raising it above them. In other words, if raised above, the lake will be too large for the evaporation area. The evaporation is even now too great in proportion to the amount of water than can be taken out. My estimates show that the evaporation this spring has been twice as much as the water coming from the Jordan [River]. If this lake is raised that proportion must increase; while if it is lowered, and the outlets consequently are lowered, the proportion lost by evaporation will be less compared with that which can be utilized.

Reports of Committees of the Senate of the United States for the First Session of the Fifty-First Congress 1889-90, Vol. 5-No. 928, Irrigation—pt. 3, at 55, 61 (1890); *see also Twelfth Annual Report, supra*, at 339 ("[T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent. . . .").

Beyond this, a basic difficulty with Utah's line of argument is that it is based almost entirely on the views of individual Congressmen who were part of a different Congress from that which passed the original Sundry Appropriations Act. The Supreme Court has admonished that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). Here the language of the 1888 Act, and the contemporaneous understanding of the Act by the agency involved in its administration support the validity of the U.S.G.S.'s authority to include the bed of Utah Lake in its 1889 selection.

4. *The Mineral Estate*

Utah asserts that in any event the 1888 Act authorized withdrawal of the surface estate only, and not the mineral estate, and that if the mineral estate had not been reserved or withdrawn, it would have passed to Utah at statehood. We find no merit in this argument. The 1888 Act does not distinguish between surface and sub-surface estates in authorizing withdrawals of reservoir sites, nor is any such distinction made in the selection order and the documents surrounding the selection. We hold, therefore, that the 1888 Act and the reservation made pursuant to it covered the lakebed, and underlying minerals, not just the surface of the bed, among the lands withdrawn in connection with Utah Lake.

C. *Selection Purposes*

Apart from questions of congressional intent, Utah argues that it must not be deprived of title to the bed of Utah Lake except upon a strict and narrow concept of "public exigency," citing *Montana*, 450 U.S. at 552, 556, 101 S.Ct. at 1251, 1253 (1981). Utah says that a public exigency requires a public necessity and not simply an "appropriate public purpose" as the district court apparently thought. Its brief argues that under no reasonable view of the facts and legislative history can it be said that Congress imagined some public exigency would go unresolved if the bed of Utah lake were not withdrawn. Appellant's Reply Brief 13-14. In *Montana*, the Court did stress the general principle of holding land in trust for

future States and that control over property underlying navigable waters is strongly identified with the sovereign power of government. *Montana*, 450 U.S. at 551-52, 101 S.Ct. at 1251-52. However, the Court also stated:

> It is now established, however, that Congress may sometimes convey lands below the highwater mark of a navigable water,
>
> > "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, *or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.*" *Shively v. Bowlby*, 152 U.S. 1, 48 [14 S.Ct. 548, 566].

Id. at 551, 101 S.Ct. at 1251 (emphasis added) (brackets in opinion of Supreme Court). The Court went on to emphasize that "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, . . . it will not be held that the United States has conveyed such land except because of 'some international duty or *public exigency.*'" *Id.* at 552, 101 S.Ct. at 1251 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926) (emphasis added).[7]

[7] Later in the opinion, in discussing whether title to the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court elaborated upon the public exigency test as follows:

> [E]ven though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of **Shively v. Bowlby**, 152 U.S., at 48 [14 S.Ct. at 566] justifying a congressional conveyance of a riverbed, **see, e.g., Alaska Pacific Fisheries v. United States**, 248 U.S. 78, 85 [39 S.Ct. 40, 63 L.Ed. 138] the situation of the Crow Indians at the time of the treaties [of 1851 and 1868] presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future states. **See Shively v. Bowlby, supra**, [152 U.S.] at 48 [14 S.Ct. at 566]. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.

Montana, 450 U.S. at 556, 101 S.Ct. at 1253.

In the instant case, the district court held that "[t]he withdrawal of Utah Lake was made 'after acquiring the territory and before the creation of the state' for the carrying out of 'public purposes appropriate to the objects for which the territory was held.' Those purposes include irrigation for the benefit of future settlers of the arid West." II R. 336 (quoting *Holt State Bank*, 270 U.S. at 54-55, 46 S.Ct. at 198-99.) Although the court did not characterize its holding explicitly in terms of a "public exigency," we are satisfied that the withdrawal of Utah lake, including its bed, was made for a public purpose motivated by a public exigency, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled. *See* 25 Stat. 509, 526-27. That the United States may now be using the site for the additional purpose of developing minerals under the lake does not defeat the validity of the reservation of the lakebed based on the public exigency existing at the time the site selection was made.

In sum, we conclude that the title to the bed of

Utah Lake did not pass to the State of Utah upon its admission to the Union under the equal-footing doctrine.

III

The Submerged Lands Act

The State further argues that the 1889 withdrawal, even if valid initially, no longer has any force or effect because it was superseded in 1953 by the Submerged Lands Act, 43 U.S.C. §§ 1301-1343, which, it says, disclaimed to the states any federal interest in any beds of inland navigable waters, unless the United States was actually in possession of such lands under some claim of right. Appellant's Brief 69. Utah asserts that it obtained title to the bed of Utah Lake under the Act because the United States was not in actual possession of the lakebed in 1953 or, for that matter, at any time since Utah's statehood. *Id.*

We must disagree. Sections 1311(a) and (b)(1) of the Submerged Lands Act provide:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters . . . be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states . . .;
>
> (b)(1) The United States releases and relinquishes unto said states and persons aforesaid, *except as otherwise reserved herein,* all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources. . . .

43 U.S.C. §§ 1311(a), (b)(1) (emphasis added). Section 1313(a), in turn, excepts from the operation of § 1311, *inter alia,* "all lands expressly retained . . . by the United States when the state entered the Union (otherwise than by a general retention . . . of lands underlying the marginal sea)."

As discussed in Part II, *supra,* the United States expressly reserved the bed of Utah Lake for federal reservoir purposes in 1889, seven years before Utah became a state. Thus, this case falls squarely within the language of § 1313(a), and the 1889 withdrawal remains valid. *See United States v. Alaska,* 423 F.2d at 768.

Utah argues, however, that the legislative history of the Submerged Lands Act shows that Congress intended to include Utah Lake as part of the inland navigable waters vested and confirmed in state ownership by the Act. Utah relies on Appendix F of the Senate Report, which shows the total acres of inland waters in the State of Utah. Utah then refers to the source of that appendix, a Census Bureau report, to determine the number of acres of inland navigable waters in Utah County. Finally, it uses a series of tables and maps in the Census publication to conclude that Utah Lake must have been included among the waters totalled for the State. Appellant's Brief 70-73.

Utah's reliance on the legislative history of the Act is misplaced. Appendix F of the Senate Report, entitled

"Approximate areas of submerged lands within state boundaries," *see* III R. 93, simply describes the inland waters that are subject to the Submerged Lands Act and does not reflect any reduction to account for the exceptions contained in § 1313. Furthermore, the Census report on which that appendix was based, *Areas of the United States, 1940, 16th Census of the United States,* was, as its title indicates, taken from a 1940 census and was not tailored to the exceptions provided in the Submerged Lands Act of 1953.

Utah also argues that it never expressly agreed to federal ownership of the bed of Utah Lake at the time of statehood, and that such agreement is essential to trigger the exception in § 1313, citing statements in the legislative hearings. This argument, however, would have us ignore the explicit language in the statutory exception, which speaks only of lands "expressly retained . . . by the United States when the states entered the Union . . . ," 43 U.S.C. § 1313(a), and says nothing of state concurrence. Thus, the absence of agreement is irrelevant to the question whether title to the bed of Utah Lake vested in the State under the Submerged Lands Act.

We conclude that the title of the United States to the bed of Utah Lake was not altered by the passage of the Submerged Lands Act. The United States expressly withdrew the lakebed prior to statehood and under 1313(a) Congress specifically excepted such lands from the operation of the Act.

IV

Conclusion

Accordingly, the district court's summary judgment quieting title to the bed of Utah Lake in the United States is

AFFIRMED.

APPENDIX B

The STATE OF UTAH, By and Through its DIVISION OF STATE LANDS, Plaintiff,

vs.

UNITED STATES OF AMERICA; JAMES G. WATT,* Secretary of the United States Department of the Interior; FRANK GREGG, Director of the Bureau of Land Management within the Department of the Interior; and PAUL L. HOWARD, Utah State Director of the Bureau of Land Management, Defendants.

Civ. No. C 79-0302J.

United States District Court, D. Utah, C.D.

April 15, 1985.

Dallin W. Jensen and Michael M. Quealy, Salt Lake City, Utah, for plaintiff.

Joseph W. Anderson, Asst. U.S. Atty., Salt Lake City, Utah, Steven A. Herman and Lawrence Puckett, Dept. of Justice, Land & Natural Resources Div., Washington, D.C., for defendants.

MEMORANDUM OPINION AND ORDER

JENKINS, Chief Judge.

Plaintiff, the State of Utah, brought this action to enjoin the defendants, the United States of America and officers of the Department of Interior, from interfering

* Successor to Cecil D. Andrus.

with Utah's ownership and management of the bed of Utah Lake, located in Utah County, Utah. Each of the parties claims to be the owner of the lakebed. Each has filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking a holding in its behalf. The essential facts are not in dispute. The Court heard arguments on the motions June 10, 1982. Joe Anderson, Esq. and Steven A. Herman, Esq. represented the United States. Richard L. Dewsnup,** Esq., Dallin W. Jensen, Esq. and Michael M. Quealy, Esq. appeared on behalf of the State of Utah. After careful consideration of the motions, the arguments made and briefs submitted, this Court issues the following Memorandum Opinion and Order.

The parties are in dispute regarding the procedure by which the case comes before this Court. The United States maintains that the action is one to determine which party has the superior claim to title to the bed of Utah Lake. According to the United States, the action is governed by the Quiet Title Act, which provides, in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest other than a security interest or water rights.

28 U.S.C.A. § 2409a(a) (1978). Although Utah relies on the Quiet Title Act as an alternative basis for juris-

** During the pendency of this decision, Richard L. Dewsnup, Solicitor General of the State of Utah, passed away. The Court would like to acknowledge the loss of Mr. Dewsnup, a skilled and memorable advocate.

diction, it asserts that the action is primarily for declaratory relief under the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201 (1982), and that this Court has federal question jurisdiction over the action. 28 U.S.C. § 1331 (1966). Utah maintains that it seeks only "a legal interpretation of the scope and effect of the 1889 Withdrawal Order on Utah Lake"[1] and that it does not seek "to resolve any of the claims of the private land owners surrounding Utah Lake."[2]

I. DECLARATORY JUDGMENT

Utah asserts that the current action is one for declaratory judgment. Under that concept, the United States argues an action will not lie against it because it has not consented to be sued — it has not waived its "sovereign immunity". The Declaratory Judgment Act alone cannot overcome the jurisdictional bar of sovereign immunity. *E.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 878, 94 L.Ed. 1194 (1950); *Bussey v. Harris*, 611 F.2d 1001, 1005 n.7 (5th Cir. 1980); *Fidelity & Casualty Co. v. Reserve Ins. Co.*, 596 F.2d 914, 916 (9th Cir. 1979); *Cook v. Arentzen*, 582 F.2d 870, 875 (4th Cir. 1978). Utah does not stop with the Declaratory Judgment Act. In addition, it relies on the Administrative Procedure Act, (APA), as the statute which provides the necessary consent and under which the United States is subject to suit.[3] Section 702 of the APA provides, in part, that:

[1] Memorandum in Support of Utah's Cross-Motion for Summary Judgment, 104.

[2] Id.

[3] Complaint at 3.

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . .

5 U.S.C.A. § 702 (1977). There is some conflict over the scope of the waiver contained in § 702. In *Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978), the Court of Appeals for the Second Circuit held that § 702 "did not remove the defense of sovereign immunity in actions under § 1331 [federal question jurisdiction]." The *Watson* court found that § 702 does not waive immunity in "nonstatutory" review of agency action. An action under § 1331 is "nonstatutory" in the sense that it is not brought under a statute that specifically provides for agency review.

The Court of Appeals for Third Circuit rejected the *Watson* analysis holding that § 702 waives sovereign immunity in "nonstatutory", as well as statutory review of agency action. *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979). The Court of Appeals for the Tenth Circuit cited the *Jaffee* opinion favorably in *Carpet & Linoleum & Resilent Tile, Etc. v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981). In *Carpet & Linoleum*, the Court of Appeals for this circuit held that § 702 waived sovereign immunity in a mandamus action grounded in federal question jurisdiction. Similarly, in the case at

bar, Utah argues that § 702 waives immunity for a declaratory judgment action in which subject matter jurisdiction also is based on a federal question. Therefore, we find that a declaratory judgment action will lie against the United States in the present dispute.

II. QUIET TITLE

Defendant, the United States, argues that the action is one under the Quiet Title Act, 28 U.S.C.A. § 2409a(a) (1978). Defendant claims that although the Act waives sovereign immunity, actions under it must be brought within the specified limitations period. Section 2409a(f) of the Quiet Title Act provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C.A. § 2409a(f) (1978). Defendant maintains that state authorities were aware of the United States "claim" to the bed of Utah Lake in 1963, more than twelve years before the action was brought[4] and thus the action is barred. In that year a series of letters were written to the Governor of Utah discussing the possibility of a federal claim to the lake bed. On February 21, 1963, the United States Secretary of Interior, Stewart Udall, wrote a letter to Governor George Clyde in which he stated that the bed of Utah Lake was segregated as a reservoir site in 1889 and that "it would appear that lands beneath navigable waters reserved by the United States

[4] This action was filed May 22, 1979.

prior to statehood, for public uses or purposes, would not pass to the state.[5]" The State of Utah argues, however, that Secretary Udall's August 15, 1963 letter is more reflective of the federal position. In that letter the Secretary of Interior stated, "We are not prepared to state with finality whether title to the bed of Utah Lake has or has not passed to the State of Utah.[6] The next correspondence on which the United States bases its argument that Utah "should have known" of the federal "claim" to the lake bed is a letter of the local Regional Solicitor written in January, 1965. Stuart McMaster, Regional Solicitor of the Bureau of Reclamation, wrote an opinion addressed to the Regional Director in which he stated:

> It is our opinion that the designation and reservation of Utah Lake as a reservoir site on April 11, 1889, pursuant to the Act of October 2, 1888, and prior to statehood in 1896, precluded the state's sovereign rights from attaching to lands underlying such navigable waters.[7]

The United States contends that the McMaster report put the state on notice that the federal government claimed an interest in the bed of Utah Lake. Utah, however, emphasizes that the report was sent to the Regional Director of the Bureau of Reclamation rather than to the

[5] Letter from Secretary of Interior to Governor of Utah (February 21, 1963) (discussing Central Utah Project).

[6] Letter from Secretary of Interior to Governor of Utah (August 15, 1963) (discussing 1889 withdrawal).

[7] Letter from Regional Solicitor, Stuart McMaster, to Regional Director, Bureau of Reclamation, Salt Lake City, Utah (January 26, 1965) (discussing reservation and withdrawal of Utah Lake as a permanent reservoir site under the Act of October 2, 1888) at 5-6.

Utah Governor.[8] Further, McMaster recommended that "when you have determined the area actually needed for the Central Utah Project, you should eliminate from the reservation and restore any excess lands now withdrawn and reserved, *and notify the state of the position taken by the United States.*[9]" Although the Governor's office was in possession of a copy of the McMaster report, there is no indication that notice was given of "the position taken by the United States." Nor is there evidence that the United States publically took the position suggested by McMaster, at that time.

The Court of Appeals for the Tenth Circuit recently interpreted the limitations section of the Quiet Title Act, stating:

> The operative words of the statute — "should have known" import a test of reasonableness. Only if it was unreasonable for the [plaintiff] to have failed to discover the *claim* of the United States should the limitations provision of § 2409a(f) become operative.

Amoco Production Co. v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980) (emphasis added). Under the facts of the present dispute, the last correspondence from the Secretary of Interior to the Governor of Utah stated that the United States was unwilling to say that it owned the lake bed. The United States had then not yet stated a claim. The McMaster report was an inter-agency memorandum suggesting the grounds by which the United

[8] Governor George Clyde was succeeded by Governor Calvin Rampton in 1965.

[9] Id. at 7 (emphasis added).

States could claim an interest in the bed of the lake. There is no indication that the Secretary of Interior changed his position in reliance on the report. Further, there is no evidence that defendants followed McMaster's advice and notified "the state of the position taken by the United States." This circuit has held that for the statute of limitations under the Quiet Title Act to run "[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Knapp v. United States,* 636 F.2d 279, 283 (10th Cir. 1980). Secretary Udall's August 15, 1963 letter indicates that the United States was uncertain whether it claimed an interest adverse to that of the state. The McMaster report analyzes a method by which the United States could claim an interest adverse to the state's if it so desired. There is no indication that it did so in 1965. Further, in *Knapp,* the Court of Appeals discounted the reliability of opinions given by individual officials as follows:

> But whatever the intent or opinions of individual government officials, only Congress had the power to release the Government's apparent interest, and plaintiff's were told this in 1958.

636 F.2d at 283 n.2. Likewise, the State of Utah cannot be expected to rely on a report by the local Regional Solicitor of the Bureau of Reclamation to the Regional Director of that department as the official statement of United States policy. This is particularly true when the United States Secretary of Interior had last informed the Utah Governor that the United States was not ready to take a position on the issue. This Court holds that the

action is timely[10] under the Quiet Title Act, 28 U.S.C.A. § 2409a *et seq.*[11]

Plaintiffs insist that this suit is one for declaratory judgment while defendants maintain that it is a Quiet Title action. Because either theory gives this Court the opportunity to examine the merits of the case, it is unnecessary to resolve that dispute.

III. THE LAKE BED

A. 1889 Withdrawal

Congress authorized the withdrawal of lands in the arid West for reservoir sites in the Sundry Appropriations Act of 1888, which provides:

> — [There is appropriated] for the purpose of investigation, the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows . . . the sum of $100,000 . . . . And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs,

[10] The McMaster report was written in 1965. This action was commenced 14 years later in 1979. There is nothing to suggest that plaintiff "should have been aware" of the United States "claim" between 1965 and 1967.

[11] Plaintiff argues that the limitations provision of the Quiet Title Act, 28 U.S.C.A. § 2409a(f) (1978), does not run against the states. A petition for certiorari has been filed with the United States Supreme Court to consider that issue. **Block v. North Dakota**, 671 F.2d 271 (2d Cir. 1981), (petition filed June 1982). We need not reach that question here, however, because we find that plaintiff's action is timely.

> ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth, hereby reserved from sale as property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law: *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

Act of October 2, 1888 (25 stat. 526). Pursuant to that Act, on April 6, 1889, John Wesley Powell, the Director of the United States Geological Survey (USGS) selected Utah Lake as a reservoir site. In a letter to the Secretary of Interior, Powell stated: "I have the honor to report that *the site of Utah Lake* in Utah County in the Territory of Utah is hereby selected as a reservoir site, *together with all lands situate*[*d*] *two statute miles of the border of said lake at high water.*"[12] As a result of that withdrawal, the USGS made a survey to more accurately describe the reserved area by legal subdivisions. In its annual update to the Secretary of Interior in 1889, the USGS included a report of Captain C. E. Dutton, which stated:

> In April Mr. Newell was sent to Utah to make certain examinations of Utah Lake with reference to its capacity for a reservoir site and to furnish the specifications for its withdrawal as such under the law, so far as *the lands covered* or overflowed

[12] Letter from Director of United States Geological Survey to U.S. Secretary of Interior (1889) (discussing Utah Lake withdrawal) (emphasis added).

by it or the lands bordering upon it *were still public lands.*[13]

In its next report, the USGS discussed the results of its study of the area reserved by the Utah Lake withdrawal. The report stated that the USGS survey "was made to include not only the bed [of Utah Lake] but the lowlands up to mean high water", as well.[14] The language used in the correspondence and documents surrounding the 1889 withdrawal expressly include the bed of Utah Lake. Because these documents reflect the involved agency's contemporaneous interpretation of the scope of the withdrawal, they are entitled to deference, *e.g., Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1969); *Udall v. Tallman,* 380 U.S. 1, 4-6, 85 S.Ct. 792, 795-6, 13 L.Ed.2d 616 (1965), and this Court now finds that the United States withdrew the bed of Utah Lake as part of the 1889 reservoir site selection.

B. Equal Footing

The state contends that even if the 1889 withdrawal included the lake bed, title passed to Utah at the time of statehood[15] under the Doctrine of Equal Footing. That doctrine provides that, like the original states which retained title to the beds of their navigable waters, all new states are entitled to the beds of navigable waters within their boundaries. *See, Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493

[13] Tenth Annual Report of the United States Geological Survey to the Secretary of Interior 1888-89, Part II, at 63 (emphasis added).

[14] Eleventh Annual Report of the United States Geological Survey to the Secretary of Interior 1889-90, Part II, at 2.

[15] Utah became a state on January 4, 1896.

(1981). In that way the new states are said to be on "equal footing" with the original states. The Equal Footing Doctrine, however, is not without exception. The United States Supreme Court examined those exceptions in *United States v. Holt Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), stating:

> It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, *and subject to the qualification that where the United States after acquiring the territory and before the creation of the state,* has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for purposes of commerce among the states and with foreign nations, *or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state,* but remain unimpaired, and the rights which otherwise would pass to the state are restricted or qualified accordingly.

Id. at 54-55, 46 S.Ct. at 198-99 (emphasis added) (citations omitted). *See also, Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981); *United States v. Anchorage, Alaska,* 437 F.2d 1081, 1085 (1971); *United States v. Alaska,* 423 F.2d 764, 768 (9th Cir.), *cert. denied,* 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed.2d 388 (1970). The withdrawal of Utah Lake was made "after acquiring the territory and before the creation of the state" for the carrying out of "public purposes appropriate to the objects for which the territory

was held." Those purposes include irrigation for the benefit of future settlers of the arid West. Under these circumstances, the United States' title in the area was "not cut off by the subsequent creation of the state." Utah's arguments to the contrary are not persuasive.

C. Submerged Lands Act

The state further asserts that it obtained title to the bed of Utah Lake through the Submerged Lands Act, 43 U.S.C.A. §§ 1301 *et seq.* (1964). In that Act, Congress relinquished the title and claims of the United States to land beneath the navigable waters within the boundaries of the states[16] and declared title and ownership of the land in the respective states.[17] Like the Doctrine of Equal Footing, the Submerged Lands Act is limited in its application. Section 1313 provides that:

> There is excepted from the operation of section 1311 of this title —
>
> (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); . . . .

43 U.S.C.A. § 1313(a) (1964). Title to the bed of Utah Lake was expressly reserved by the United States in

[16] 43 U.S.C.A. § 1311(b)(1) (1964).
[17] Id. at § 1311(a)(1).

1889,[18] seven years before Utah became a state. The Court of Appeals for the Ninth Circuit discussed the application of the Submerged Lands Act to a similar situation in *United States v. Alaska,* 423 F.2d 764 (9th Cir.), *cert. denied,* 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed.2d 388 (1970). In the *Alaska* case, the Court of Appeals held that the Act had no effect on a reservation by the United States made prior to statehood. *Id.* at 768. The Ninth Circuit based its holding on the language of the Act which specifically excluded "all lands expressly retained by or ceded to the United States when the state entered the Union. . . ." The present litigation also involves land retained by the United States before statehood. Therefore, the bed of Utah Lake is excluded from the application of the Submerged Lands Act, by § 1311(a), and title to it remains in the United States. Only Congress can relinquish the federal claim to the lake bed.

These determinations are as much a recital of history as they are legal determinations. The historic documents speak of what took place. This Court cannot simply overlook what they say. Congress, and Congress alone, may deal with the transfer of lands which have been reserved. It is to that forum the state may look if longed-for ownership is considered essential.

Based on the foregoing, plaintiff's motion for Summary Judgment is DENIED and defendant's motion for Summary Judgment is GRANTED.

[18] See supra, Part IIA.

APPENDIX C

The 1890 act, 26 Stat. 391, provides in relevant part:

> For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eight-eight, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

The 1891 act, 26 Stat. 1101, provides in relevant part:

> SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually

> necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws.

The act of February 26, 1897, 29 Stat. 599, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same ex nt as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

Supreme Court, U.S.
FILED
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CLERK

(3)

No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, by and through its
DIVISION OF STATE LANDS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether title to the bed of Utah Lake, a navigable body of water, passed to the State of Utah upon its admission to the Union in 1896.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 ..... 7, 8, 10
Block v. *North Dakota*, 461 U.S. 273 3
Borax Consol. v. *Los Angeles*, 296 U.S. 10 7
California v. *United States*, 438 U.S. 645 ..... 8, 11, 12
Chemehuevi Tribe v. *FPC*, 420 U.S. 395 13
Choctaw Nation v. *Oklahoma*, 397 U.S. 620 ..... 7, 10
Confederated Salish & Kootenai Tribes v. *Namen*, 665 F.2d 951, cert. denied, 459 U.S. 977 8
CFTC v. *Schor*, No. 85-621 (July 7, 1986) 12
Ide v. *United States*, 263 U.S. 497 ..... 8, 11
Lindahl v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985) 12-13
Lorillard v. *Pons*, 434 U.S. 575 13
Montana v. *United States*, 450 U.S. 544 ..... 6, 7, 8, 9, 10
Saxbe v. *Bustos*, 419 U.S. 65 13
Shively v. *Bowlby*, 152 U.S. 1 ..... 5, 6, 7
Summa Corp. v. *California ex rel. State Lands Comm'n*, 466 U.S. 198 7
United States v. *Alaska*, 423 F.2d 764, cert. denied, 400 U.S. 967 ..... 8, 11
United States v. *City of Anchorage*, 437 F.2d 1081 .. 8, 11
United States v. *Holt State Bank*, 270 U.S. 49 ..... 5, 7, 10
United States v. *Mottaz*, No. 85-546 (June 11, 1986) 3

Statutes: Page

Act of Mar. 3, 1891, ch. 561, § 17, 26 Stat. 1101, 43 U.S.C. 663 12
Act of Feb. 26, 1897, ch. 335, 29 Stat. 599, 43 U.S.C. 664 12
Sundry Appropriations:
Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-527 ..... 2, 3, 5, 6, 7, 9, 10
Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 391 ..... 4, 5, 11, 12
Quiet Title Act:
28 U.S.C. 1346(f) 3
28 U.S.C. 2409a 3
Submerged Lands Act:
43 U.S.C. 1301-1343 2
28 U.S.C. 1331 3

Miscellaneous:

P. Gates, *History of Public Land Law Development* (1968) 8
Geological Survey:
1888-1889 Tenth Ann. Rep. 4, 11
1889-1890 Eleventh Ann. Rep. 4, 11
1890-1891 Twelfth Ann. Rep. 4, 11
Reservation of Lands for Irrigation Purposes, 19 Op. Att'y Gen. 564 (1890) 11

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UNITED STATES OF AMERICA, ET AL.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 780 F.2d 1515. The opinion of the district court (Pet. App. 28a-41a) is reported at 624 F. Supp. 622.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. On March 12, 1986, Justice White extended the time within which to file a peti-

tion for a writ of certiorari to and including April 25, 1986, and the petition was filed on April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the ownership of the bed of Utah Lake. The parties have stipulated that the Lake was navigable on January 4, 1896, the date on which petitioner, the State of Utah, was admitted to the Union (Pet. App. 8a n.4). Petitioner claims that by operation of the equal footing doctrine, it has owned the bed of Utah Lake since that date. Both courts below rejected this claim, holding that the United States previously had selected the bed of the Lake for purposes of a federal reservoir, reserved pursuant to the Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-527.[1]

1. In late 1976, the Department of the Interior issued federal oil and gas leases on the bed of Utah Lake (Pet. App. 2a). Petitioner protested, contending that the leasing encroached upon its property interests. After unsuccessful negotiations to resolve the dispute, petitioner commenced this suit in May 1979 in the United States District Court for the District of Utah against the United States, the Secretary of the Interior, the Director of the Bureau of Land Management, and the Director of the Bureau's Utah State Office. Petitioner sought a declaratory judgment that it, rather than the United States, had

[1] Petitioner also contended in the courts below that it obtained title to the bed of Utah Lake under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1343. That additional claim also was rejected by the courts below (Pet. App. 24a-26a, 40a-41a), and petitioner does not renew it here.

title to the lake bed and sought an injunction against interference by respondents with petitioner's alleged ownership and right to manage the lake bed (*id.* at 3a, 28a-29a).[2] The district court granted summary judgment for respondents, declaring that title to the lake bed is in the United States. On petitioner's appeal, the court of appeals affirmed on grounds virtually identical to those relied upon by the district court.

The question of title resolved by the courts below turns on the particular consequences of actions pertaining to Utah Lake that were taken by federal officials pursuant to the Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-527. That Act authorized the United States Geological Survey to select "sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows" (25 Stat. 526). The Act further provided that "all the lands which may hereafter be designated or selected * * * for sites for reservoirs * * * are *from this time henceforth hereby reserved from sale as the property of the United States*, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law" (25 Stat. 527 (emphasis added)). Pursuant to this authority, both Utah Lake and the land surrounding it were selected as a reservoir site and formally reserved as property of the United States.

[2] The district court held that it had jurisdiction over the suit under 28 U.S.C. 1331 and the Quiet Title Act, 28 U.S.C. 1346(f) and 2409a (Pet. App. 31a-32a, 36a). However, the court of appeals, relying on *Block* v. *North Dakota*, 461 U.S. 273 (1983), held that the Quiet Title Act was the exclusive basis of jurisdiction (Pet. App. 4a n.2). See also *United States* v. *Mottaz*, No. 85-546 (June 11, 1986).

Thus, in a report dated April 6, 1889, John Wesley Powell, then Director of the Geological Survey, informed the Secretary of the Interior that "the site of Utah Lake in the Territory of Utah is hereby selected as a reservoir site, together with all lands situated within two statute miles of the border of said lake at high water" (Pet. App. 10a). Both courts below held on the basis of this and other documents that the selection of Utah Lake included the bed of Utah Lake, thereby reserving the bed as property of the United States under the 1888 Act (Pet. App. 13a, 37a-38a).[3]

Thereafter, in the Sundry Appropriations Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 391, Congress, on a prospective basis, repealed the relevant provisions of the 1888 Act. But Congress expressly did not

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[3] The Geological Survey's selection of the bed of the Lake is confirmed by the Survey's official reports. The Tenth Annual Report (1888-1889) stated that Utah Lake had been examined "with reference to its capacity for a reservoir site" and that the Survey had determined "the specifications for its withdrawal as such under the law, *so far as the lands covered* or overflowed by it or the lands bordering upon it *were still public lands*" (Pet. App. 11a (emphasis added)). The Survey's Eleventh Annual Report (1889-1890) stated that "a careful survey was made of Utah Lake * * *. This land being, therefore, the natural flood ground of the lake should be reserved up to the high-water line. Accordingly, the segregation * * * was made to include *not only the bed* but the lowlands up to mean high water" (Pet. App. 11a-12a (emphasis added)). The Survey's Twelfth Annual Report (1890-1891) also referred to Utah Lake, stating that "the segregation of the land around *and under* the lake was made to a contour line which should be 5 feet above the low-water mark of 1879" (Pet. App. 13a (emphasis added)). The contemporaneous understanding therefore was that the Director of the Geological Survey intended in 1889 to select, for purposes of the 1888 Act, the lands submerged by the waters of Utah Lake.

rescind the reserved status of any land selections, such as that at issue here, that already had been made. An exception to the 1890 Act stated "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act], until otherwise provided by law" (26 Stat. 391).

2. Both courts below held that the 1888 Act authorized the Geological Survey to select submerged lands, such as those beneath Utah Lake, and that the selection in this case was sufficient to prevent title to the lake bed from passing to petitioner upon its admission to the Union (Pet. App. 13a-15a, 21a-24a, 38a-40a). The district court held that title to the lake bed did not pass to Utah under the equal footing doctrine because "[t]he withdrawal of Utah Lake was made 'after acquiring the territory and before the creation of the state' for the carrying out of 'public purposes appropriate to the objects for which the territory was held'" (*id.* at 39a-40a, quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)). The court specifically found that those "appropriate" public purposes "include irrigation for the benefit of future settlers of the arid West" (Pet. App. 40a).

The court of appeals also specifically addressed petitioner's claim that Utah could not be deprived of title to the lake bed unless the prior reservation was mandated by some "public exigency" or "public necessity" (Pet. App. 21a). The court of appeals emphasized (*id.* at 22a) that the conclusion that the reservation served an "appropriate public purpose" was based on this Court's own formulation in *Shively* v. *Bowlby*, 152 U.S. 1 (1894), which held that Congress may convey lands underlying navigable waters, and thereby defeat the State's title thereto, in order

to carry out " 'public purposes appropriate to the objects for which the United States hold the Territory' " (Pet. App. 22a, quoting 152 U.S. at 48, as quoted in *Montana* v. *United States*, 450 U.S. 544, 551 (1981)). The court of appeals further observed, however, that "[a]lthough the [district] court did not characterize its holding explicitly in terms of a 'public exigency,' we are satisfied that the withdrawal of Utah [L]ake, including its bed, was made for a public purpose motivated by a public exigency, given Congress' stated concerns [in the 1888 Act] that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. The court of appeals' application of the equal footing doctrine to the particular circumstances of this case is fully consistent with the principles recently reiterated and confirmed in *Montana* v. *United States*, 450 U.S. 544 (1981). Review by this Court therefore is not warranted.

1. States admitted to the Union after the adoption of the Constitution are deemed to be on an "equal footing" with the original 13 states. One aspect of this principle is that a newly admitted state in general has the same right as the original states to lands beneath navigable waters. *Shively* v. *Bowlby*, 152 U.S. 1, 26-28 (1894). At the same time, however, Congress has the unquestioned power to reserve or otherwise dispose of such submerged lands that have not been included within a state, and thereby to defeat the title to such lands that otherwise would pass to the state under the equal footing doctrine at the

time of its admission to the Union. Congress may do so in order " 'to perform international obligations,' " to facilitate commerce, or " 'to carry out other public purposes appropriate to the objects for which the United States hold the Territory.' " *Montana* v. *United States*, 450 U.S. at 551 (quoting *Shively*, 152 U.S. at 48). See also *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 633-634 (1970); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87 (1918).[4] In other words, although lands underlying navigable waters are presumed to pass to the State upon admission, that presumption may be overcome where the federal government has otherwise provided for a disposition of the land prior to statehood, based on " 'some international duty or public exigency' " (*Montana* v. *United States*, 450 U.S. at 552, quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)). The court of appeals adhered to and correctly applied those principles here.

2. As an initial matter, there can be little doubt that the selection and reservation of Utah Lake and the surrounding lands as property of the United States was for a "public purpose[] appropriate to the objects for which the United States h[e]ld the Territory" and that the United States responded to a "public exigency" in doing so. Before the passage of the 1888 Act, officials of the United States were

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[4] Even after statehood, Congress may validly authorize proceedings and transactions to confirm the pre-statehood disposition of such submerged lands to others (*Borax Consol.* v. *Los Angeles*, 296 U.S. 10, 21 (1935); *Summa Corp.* v. *California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984)), and a state that fails to present timely claims in the confirmatory proceedings is barred thereafter (*Summa Corp.*, 466 U.S. at 206-207 n.4).

"actively conducting investigations and collecting data with a view to developing and formulating a feasible plan for taking up and prosecuting" the work of reclaiming, through irrigation, the arid lands west of the 100th meridian. *Ide* v. *United States*, 263 U.S. 497, 502 (1924). Yet "[t]he opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts" (*California* v. *United States*, 438 U.S. 645, 659 (1978)). As petitioner concedes (Pet. 3, 13), there was acute concern that reservoir sites would "fall into the hands of 'monopolistic speculators' " (P. Gates, *History of Public Land Law Development* 641 (1968)). These concerns plainly were perceived by Congress in the late 19th century as giving rise to a "public exigency" requiring decisive legislative action, and that exigency is sufficient in this case to overcome the presumption that the land underlying a particular navigable body of water passes to the new state upon its admission to the Union. See *Alaska Pacific Fisheries* v. *United States*, 248 U.S. at 87-89; *Confederated Salish & Kootenai Tribes* v. *Namen*, 665 F.2d 951, 961-962 & n.27 (9th Cir.), cert. denied, 459 U.S. 977 (1982); *United States* v. *City of Anchorage*, 437 F.2d 1081, 1084 (9th Cir. 1971); *United States* v. *Alaska*, 423 F.2d 764, 766-767 (9th Cir.), cert. denied, 400 U.S. 967 (1970).

The court of appeals in fact reiterated and applied the principle, recognized in *Montana* v. *United States*, that the presumption that lands underlying navigable waters passed to the new state ordinarily will be overcome only upon a demonstration that the United States responded to " 'some international duty or public exigency' " (see Pet. App. 22a (quoting 450 U.S.

at 552)). Thus, the court of appeals concluded that "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by a *public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a (emphasis added)). The court of appeals' application of settled principles in the particular circumstances of this case does not warrant review by this Court.[5]

3. As explained above (see page 4 & note 3, *supra*), the Geological Survey's selection and the reservation of Utah Lake expressly included the bed of the Lake. By the terms of the 1888 Act, this land, including the bed, was to remain "as the property of the United States" (25 Stat. 526-527), and it there-

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[5] Petitioner contends (Pet. 15-16) that the court of appeals' resting of its decision on a finding of "a public purpose motivated by a public exigency" constituted a departure from the Court's reference in *Montana* v. *United States* to a "public exigency." However, there is no indication that the court of appeals either intended or effected such a departure, especially since it used the term "public exigency" and discussed this Court's analysis in some detail. See Pet. App. 22a-23a. Moreover, as the Court made clear in *Montana* v. *United States*, the existence of a "public exigency" is principally a guide to ascertaining whether the United States *intended* to reserve the land for an "appropriate public purpose," which in turn would justify a disposition of the property in such a manner as to prevent it from passing to the State under the equal footing doctrine. See 450 U.S. at 556. In this case, the question of intent is clear without the need to rely on inferences, because the United States *expressly* reserved the bed of Utah Lake for the manifestly "appropriate public purpose" of promoting reclamation and orderly settlement of land. See note 3, *supra*, and pages 8-10, *infra*.

fore did not pass to the State. Petitioner argues (Pet. 16, 18-21), however, that the Geological Survey's selection was insufficient because the 1888 Act did not itself expressly refer to lands underlying navigable waters. But *Montana* v. *United States*, upon which petitioner principally relies, makes clear that an express reference in the governing Act is not required. Although the Court there stated that a pre-statehood conveyance would not be lightly inferred, it made clear at the same time that the intent to withhold land from passing to the State need not be shown by a definite declaration to that effect, so long as the intent is " 'otherwise made very plain' " (450 U.S. at 552 (quoting *Holt State Bank*, 270 U.S. 55)). Significantly, the Court also discussed with approval its prior decisions in *Choctaw Nation* v. *Oklahoma* and *Alaska Pacific Fisheries* v. *United States*, both of which held that an intent sufficient to defeat the State's claim of title could be inferred from extrinsic circumstances. See 450 U.S. at 555-556 & n.5.

Moreover, in this case the text of the 1888 Act was broad in its coverage and definite in its consequences. The enactment of the statute had the immediate effect of "reserv[ing] from sale as the property of the United States" all lands that might thereafter be designated or selected for reservoir sites.[6] The

[6] For this reason, petitioner errs in characterizing the reservation of the bed of Utah Lake as an "administrative withdrawal" by the Geological Survey in 1889 (Pet. 18-19). The 1888 Act *legislatively* reserved that land as of 1888, because the text of the 1888 Act provided that lands, even though not yet designated or selected as reservoir sites, were "hereby" reserved as of the enactment date; later selection by the Geological Survey merely established the dimensions of the legislative withdrawal. This was the contemporaneous understanding of the Attorney General, who observed that selection

1888 Act covered "all the lands" so designated or selected and, as the court below correctly observed, imposed "no restriction * * * on the type of lands that could be designated or selected" (Pet. App. 15a). Furthermore, within a year of the Act's passage, Congress was made aware of the Geological Survey's selection of Utah Lake (see *id.* at 10a), and the Tenth, Eleventh and Twelfth Annual Reports of the Geological Survey made clear that this selection included the Lake's bed. Congress did not thereafter act to repudiate either the Survey's legal position that the beds of navigable bodies of water were embraced by the reservation accomplished by the 1888 Act or the specific selection and reservation of the bed of Utah Lake. This omission is significant, because the "storm of indignation from the people of

of a reservoir site, subsequent to the 1888 Act, would accomplish "the reservation thereof *dating back to the passage of this [1888] act.*" 19 Op. Att'y Gen. 564, 566 (1890) (emphasis added).

Because the 1888 Act had the "practical effect of reserving all the public lands in the west from settlement" (*California* v. *United States*, 438 U.S. at 659), Congress enacted the Sundry Appropriation Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 391, in order to repeal prospectively the legislative reservation made by the 1888 Act (*Ide* v. *United States*, 263 U.S. 502). In respect to future reservoir selections, the 1890 Act made their reservation effective as of the selection date (26 Stat. 391). However, all prior site selections, such as the 1889 selection of Utah Lake, were confirmed (*ibid.*).

At all events, contrary to petitioner's contention (Pet. 18-21), the mere fact that a reservation of submerged lands comes to fruition by administrative action does not undermine its effectiveness for purposes of the equal footing doctrine. See, *e.g.*, *United States* v. *City of Anchorage*, 437 F.2d at 1082; *United States* v. *States of Alaska*, 423 F.2d 764, 765, 766-767 (9th Cir.), cert. denied, 400 U.S. 967 (1970).

the West" (*California* v. *United States*, 438 U.S. at 659) persuaded Congress to narrow the 1888 Act in the 1890 Sundry Appropriations Act to provide that site reservations would take effect only on the date of actual selection and designation of a site, not before. But Congress in 1890 also expressly confirmed, by the savings clause in the 1890 Act, the Geological Survey's prior selection of Utah Lake (as well as all other site selections) under the earlier Act. Accordingly, even if there had been some doubt regarding the authority of the Geological Survey to select the bed of the Lake, despite John Wesley Powell's contemporaneous construction of the 1888 Act to the contrary (see pages 3-4, *supra*), the 1890 Act eliminated any such concerns.

Finally, when Congress again passed new laws concerning reservoir sites—specifically Section 17 of the Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, 43 U.S.C. 663 (which limited the size of reserved sites to land actually necessary for reservoir construction and maintenance) and the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599, 43 U.S.C. 664 (permitting non-federal use and occupancy of such sites on certain conditions) —it again did not repudiate the previously confirmed reservation of Utah Lake and its bed.[7] This failure by Congress to overturn the administrative action when it once again revisited the subject of reservoir site selection lends still further support to the Geological Survey's 1889 selection of the bed of Utah Lake and the resulting failure of the bed to pass to Utah at statehood in 1896. *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11; *Lindahl* v. *Office of*

[7] The background of the 1891 and 1897 Acts was discussed by this Court in *California* v. *United States*, 438 U.S. at 659-662.

Personnel Management, No. 83-5954 (Mar. 20, 1985), slip op. 12 n.15; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 410 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). Against this background, the courts below correctly rejected petitioner's efforts to reopen that question. Further review therefore is not warranted.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] The question of the ownership of the bed of Utah Lake also does not at this time appear to be of significant practical importance. Although the Bureau of Land Management issued five exploratory oil and gas leases for the bed in 1976, we have been informed by the Department of the Interior that these leases were of 10-years' duration and are about to expire and that no drilling permits ever were issued for the production of oil and gas from the bed of the Lake.

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No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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August 20, 1986

TABLE OF CONTENTS

Page

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935) 4

California v. United States,
438 U.S. 645 (1978) 5, 6

Montana v. United States,
450 U.S. 544 (1981) 2, 3, 5, 6, 7

Pollard's Lessee v. Hagan, 3 How. 212 (1845) 4

United States v. California,
436 U.S. 32 (1978) 3, 4

Statute:

25 Stat. 505 (Sundry Appropriations Act of 1888) 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

This case concerns the sovereign ownership of the bed of Utah Lake under the Equal Footing Doctrine. The decision below does more than wrongly deprive Utah of its sovereign and proprietary ownership and control of the lakebed. It also creates fundamental issues of State sovereignty and equality, and of the proper rela-

tionship between the state and federal systems; of whether an Equal Footing entitlement can be defeated by an administrative withdrawal (rather than by a duly authorized conveyance) of the submerged land; of whether the United States, as the States' trustee over sovereign lands pending statehood, has fulfilled its trust duties (and whether it even correctly understands those duties); of whether the inherent and long-recognized distinction between sovereign lands and public-domain lands survives; and of whether the court of appeals has applied the correct standard and analysis under the Equal Footing Doctrine.

This case is very important to Utah. Utah Lake is the State's largest freshwater lake and one of its important resources. But the aforementioned issues make this case also one of national significance, as is clear from the fact thirty other States have joined as *amici* to urge the Court to grant certiorari.

Their concern is justified. The decision below elevates federal reservations and withdrawals over the States' Equal Footing entitlements. That decision jeopardizes State sovereignty and equality, the States' dignity and standing relative to the Federal Government, and the status of sovereign lands. Because of the Constitutional problems it creates, and its conflict with a long line of this Court's decisions, including *Montana v. United States,* 450 U.S. 544 (1981), the decision below should be reviewed.

1. The United States' "Brief For The Respondents In Opposition" demonstrates some of the reasons the

Court should grant certiorari in this case. Respondents state that despite the Equal Footing Doctrine, "Congress has the *unquestioned* power to reserve or otherwise dispose of such submerged lands that have not been included within a state, and thereby to defeat the title to such lands that otherwise would pass to the state . . . ." Respondent's Brief 6 (emphasis added). Their statement is not true; whether the Government may reserve or withdraw sovereign lands to defeat a State's title is a vital issue this Court has never decided in this context. The Court has found Constitutional authority for the United States' deprivation of a State's Equal Footing entitlement only in cases where the United States had previously made a valid *conveyance* of the submerged lands to a third party. And such cases are very few indeed. See Pet. 19 and n. 14. As even the Respondents admit, *Montana v. United States* "stated that a pre-statehood *conveyance* would not be lightly inferred . . . ." Respondents' Brief 10 (emphasis added).

USGS's administrative withdrawal of the bed of Utah Lake is not tantamount to a conveyance from the United States to a new owner. It is merely a particular federal land classification. *United States v. California,* 436 U.S. 32, 40 (1978). Even assuming the soundness of Respondents' argument (Respondents' Brief 10, n. 6), which we dispute, that it really was Congress, not just USGS, that had intended to reserve or withdraw the bed of Utah Lake, nothing changes the unavoidable conclusion that no conveyance ever was made and that the United States still possessed title, which was then available to pass to Utah at statehood.

If something less than a conveyance will suffice to satisfy the Constitutional standard, this Court has never suggested as much. Indeed, in the only analogous decision of this Court, *United States v. California,* 436 U.S. 32 (1978), the State's title was upheld under the Submerged Lands Act despite federal reservation of the disputed land. The Court stated that the federal reservation could not improve the United States' claim to the land as against the State. *Id.* at 41. The decision below, which deprived Utah of title, is contrary to this Court's precedents and reflects a lack of understanding of the ramifications.

2. The Federal Government has long been obligated to act as trustee over the future States' Equal Footing lands. *Pollard's Lessee v. Hagan,* 3 How. (44 U.S.) 212 (1845); *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15 (1935). In light of that fiduciary responsibility, it is very disturbing that Respondents claim the "unquestioned" power to defeat a State's Equal Footing entitlement simply by withdrawing or reserving submerged lands. Such "power" is far from "unquestioned"; indeed, according to established Constitutional law, such power does not exist. The United States' readiness to "presume away" the State's entitlement raises doubt about its commitment to its trust responsibilities. The trustee's failure to appreciate the rules governing such an important trust constitutes a cogent reason to grant certiorari in this case.

3. While, if the legal requisites are met, trust property (sovereign lands) can be conveyed before statehood, it is permissible only under "some international duty or

public exigency." *Montana v. United States,* 450 U.S. 544, 552 (1981). However, the decision below would permit a federal reservation or withdrawal to defeat sovereign title for something less than a public exigency,[1] contrary to this Court's decisions. *Id.*

Utah emphasizes, moreover, that the problem with the decision below is not just its failure to understand the correct "public exigency" standard. Rather, it is also that there was no relevant public exigency in any event. "Exigency" denotes a very strong need, and the lakebed clearly was not at all needed for the 1888 Act's assumed purpose of facilitating irrigation. See Pet. 16.

Under Utah water law, the water of Utah Lake was always available for irrigation regardless of whether Utah or the United States owned the bed of this navigable lake. *Cf. California v. United States,* 438 U.S. 645, 660 (1978). Irrigation did not depend on the lakebed, so the purported public purpose or exigency could not have involved the lakebed. The unavoidable implication of Respondents' position, that withdrawal of the lakebed was exigently necessary to irrigation, is patently illogical. See Pet. 9-15.

Having shown that there was no public exigency upon which withdrawal of the lakebed could be justified, we add that the other requirement of *Montana v. United*

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[1] The Tenth Circuit's standard, supported here by Respondents as somehow appeasing the true Constitutional standard, is that States may be deprived of sovereign lands whenever the federal action was intended to meet some "appropriate" public purpose or "a public purpose motivated by a public exigency." Pet. App. 23a; Respondents' Brief 5-6, 9, n. 5.

States, supra, also has not been met here: The "strong presumption" must be that there has been no federal pre-statehood conveyance of a State's sovereign land. *Id.* at 552; Pet. 8, 11-12. That presumption can be overcome only by a Congressional intent "definitely declared or otherwise made [very] plain," "in clear and especial words." *Montana,* at 552; Pet. 8. Under *Montana* both the "public exigency" and "definiteness of expression" components must be present. In this case neither is present.

Respondents irrelevantly state that: "[t]he opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts." Respondents' Brief 8, quoting *California v. United States,* 438 U.S. 645, 659 (1978). Such concerns could not have mattered in the instant case. The bed of Utah Lake was neither legally nor actually susceptible of being settled or homesteaded. Simply, there was no purpose, need or exigency for reserving the lakebed, and Congress did not express any intention to effect such a reservation. Respondents' attempt to defeat the State's title must therefore fail.

The decision below makes it much easier than this Court has ever allowed, for the United States to justify depriving a State of its Equal Footing entitlement. If the decision below is not corrected, more encroachments will likely follow, especially since this case indicates that Respondents will not exert proper fiduciary dedication towards their Constitutional trust obligations. Respondents' position reflects great insensitivity to the States' sovereign rights under the Equal Footing Doctrine.

4. Utah's Petition shows that several Constitutional Equal Footing problems flow from the decision below. Respondents have failed to respond to most of them. For example, Respondents simply ignore the impact this case will have, legally and practically, on the classification, administration, and ownership of sovereign lands vis-a-vis public-domain lands. Pet. 5, 17. They also make no mention of the lower court's inversion of the "strong presumption" this Court has firmly established in favor of States' sovereign title. *Montana v. United States,* 450 U.S. at 552; see Pet. 8-11, 17-18.

The sovereign rights protected under the Equal Footing Doctrine are vital to the States. Their deprivation as allowed by the lower court creates serious concerns that the Federal Government is arrogating powers not given it, to the disparagement of rights long held to have been reserved by the States as inherent rights. The States' entitlement should not be denied except upon the exacting standards consistently enforced by this Court. The decision below falls far short of those standards, and should be reviewed and reversed.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a pre-statehood federal withdrawal can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

TABLE OF CONTENTS

	Page
Question presented	i
Interest of amici curiae	1
Question presented	4
Reasons for granting the writ	4
I	
The decision below conflicts with prior rulings of this court	5
II	
The importance of the sovereign rights at issue warrants review	9
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

	Page
Alaska v. United States, Nos. A 83-343, A 84-435 and A 86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986)	10
Alaska v. United States, No. A 86-110 (D. Alaska, filed February 21, 1986)	10
Appeal of Cook Inlet Region, Inc., No. 84-149 (Interior Board of Land Appeals, filed November 5, 1983)	11
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	2, 6
Coyle v. Smith, 221 U.S. 559 (1911)	11
Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892)	10
Kaiser Aetna v. United States, 440 U.S. 164 (1979)	7
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)	5
Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982)	8
Montana v. United States, 450 U.S. 544 (1981)	2, 6
Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867)	5
Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	6, 8, 10
Ounalashka Corp. v. Alaska, No. 77-918 (Alaska Superior Court, filed January 31, 1977)	10, 11
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)	5, 9, 11
Shively v. Bowlby, 152 U.S. 1 (1894)	5
State of Alaska, No. 85-768 (Interior Board of Land Appeals, filed July 10, 1985)	11
United States v. California, 342 U.S. 19 (1947)	7
United States v. California, 436 U.S. 32 (1978)	6, 8
United States v. Louisiana, 363 U.S. 1 (1960)	7

TABLE OF AUTHORITIES CITED

CASES

	Page
United States v. Oregon, 295 U.S. 1 (1935)	5, 8
United States v. Utah, 283 U.S. 64 (1930)	7
U.S. Constitution	
Commerce Clause, article I, section 8, cl. 3	8
Property Clause: article IV, section 3, cl. 1	11
article IV, section 3, cl. 2	8
Other Authorities	
Submerged Land Act, 43 U.S.C. §§ 1301, et seq.	6
H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957)	8
Public Land Law Review Commission, *One-Third of the Nation's Land* (1970), 43	3
Sol. Op. M-36911, 86 I.D. 151 (1978)	3

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INTEREST OF AMICI CURIAE

There are many navigable rivers and lakes within the boundaries of the states appearing as *amici curiae*. For more than 140 years, this Court consistently has held that title to the lands under these navigable waterbodies is an incident of sovereignty reserved

to the states, subject only to the powers surrendered to the national government in the Constitution. This sovereign ownership vested in the original 13 states as direct successors to the English crown, and was retained by them when they formed the Union. Because the Constitution requires that all states are equal with respect to sovereignty, the United States holds such lands in territories in trust for future states, and title passes from the federal government to new states when they join the Union and assume sovereignty on an "equal footing" with previously-admitted states.[1]

The only exception to this equal footing doctrine which this Court has recognized is the rare situation where title to lands underlying navigable waters was conveyed to a third party prior to statehood.[2] In this case, the Court of Appeals for the Tenth Circuit created a new exception, holding that the pre-statehood federal designation of Utah Lake as a potential reservoir site, as distinct from a pre-statehood conveyance to a third party, defeated Utah's sovereign title to the lakebed under the constitutional equal footing doctrine.

This ruling, unsupported in this Court's prior decisions, diminishes Utah's sovereignty and places Utah on a less-than-equal footing with respect to the original 13 states. Since the equal footing doctrine requires that *amici* states' sovereignty is equal to Utah's, their sovereignty also will be diminished if this decision is permitted to stand. If not reversed, the decision will alter the fundamental relationship between the states and the federal government by elevating federal executive action above the constitutional sovereign rights of the several states.

The Court of Appeals' decision will have significant practical consequences as well. The excessive use of federal withdrawal

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[1] *See generally* Montana v. United States, 450 U.S. 544, 551-552 (1981), and cases cited.

[2] *E.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (characterized in *Montana* as "a singular exception" to the otherwise "established line of cases," 450 U.S. at 555 n.5, holding that title to submerged lands vests in the states at statehood).

authority is generally recognized.[3] Many navigable waterbodies in *amici* states lie within the exterior boundaries of pre-statehood federal withdrawals and reservations[4] similar to the pre-statehood federal designation of Utah Lake as a potential reservior site. The lower court's ruling may have a direct effect on *amici* states' sovereign ownership of lands under navigable waterbodies which lie within the exterior boundaries of pre-statehood federal withdrawals.

These states' concern is not a hypothetical one. The mere existence of a withdrawal on the date of statehood, even when revoked shortly thereafter, has served as the basis of a federal claim that a state's equal footing rights have been defeated.[5] The

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[3] The Public Land Law Review commission stated:

> Concern about problems associated with the "withdrawal" and "reservation" of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. *The contractor's study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.*
>
> . . .
>
> *. . . In short, the excessive use of Executive withdrawals has become a source of increasing controversy.*

Public Land Law Review Commission, *One-Third of the Nation's Land* (1970) at 43-44 (footnote omitted; emphasis added).

[4] A "withdrawal" of public lands removes them from settlement, sale or entry under some or all of the public land laws. A "reservation" dedicates them for some specific purpose. *See* Public Land Law Review Commission, *One Third of the Nation's Land* (1970) at 43 n.1.

[5] The most egregious example may be Sol. Op. M-36911, 86 I.D. 151 (1978), which concluded that a 1943 withdrawal of 48.8 million acres, constituting all of Alaska's North Slope, and a reservation of the minerals therein "for use in connection with the prosecution of [World War II]" totally defeated Alaska's title to the beds of all navigable waters in the lands withdrawn and that title to the beds remained with the federal government, notwithstanding the end of the war in 1945, Alaska's admission to the Union in 1959 and revocation of the withdrawal in 1960.

Court of Appeals' decision, if permitted to stand, will only encourage further federal assaults on state sovereignty and the several states' sovereign title to the beds of navigable waterbodies within the exterior boundaries of pre-statehood federal withdrawals.

This case presents a basic question concerning the relationship between the inherent sovereign rights of the several states and the powers surrendered to the national government in the Constitution. For these reasons, *amici* states believe that the case should be reviewed by this Court.

QUESTION PRESENTED

Although the Court of Appeals' decision presents specific questions relating to the federal withdrawal of Utah Lake as a potential reservoir site,[6] the *amici* brief is limited to the following question: whether a pre-statehood federal withdrawal can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

REASONS FOR GRANTING THE WRIT

The *amici* states urge this Court to review the Court of Appeals' decision because the decision (1) conflicts with this Court's decisions relating to the equal footing doctrine and submerged land ownership, and (2) is an unwarranted and unnecessary diminishment of state sovereignty presenting a fundamental question regarding the balance between the states' sovereign rights and those surrendered to the federal government. The significance of the lower court's error, together with the importance of the sovereign rights at issue and the direct and potential effect of the decision, merit the exercise of this Court's certiorari jurisdiction.

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[6] *Amici* states agree with Utah that the questions relating to the specific withdrawal of Utah Lake as a potential reservoir site independently merit this Court's review.

I

THE DECISION BELOW CONFLICTS WITH PRIOR RULINGS OF THIS COURT

This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty. The original 13 states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). All subsequently-admitted states enter the Union on an equal footing with the original 13 states, and accordingly must hold the same title to the lands underlying navigable waters within their respective boundaries. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Under this equal footing doctrine, "the new states since admitted have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867).

To implement the equal footing doctrine of *Pollard's Lessee*, the United States holds such lands in a territory "in trust for the several States to be ultimately created out of the territory." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935). The transfer of title from the United States, as trustee for the new state, to the new state is a matter of constitutional law, not federal grace:

> Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is confirmed not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the state is absolute so far as any federal principle of land titles is concerned.

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

At the same time, this Court has recognized that the United States may defeat a state's title to lands underlying navigable waters by conveying them to a third party prior to statehood. However, such conveyances will be found only in extraordinary circumstances:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations and footnote omitted). Indeed, such pre-statehood conveyances are so rare that *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that the bed of the Arkansas River was conveyed to three Indian tribes prior to Oklahoma's admission to the Union and therefore Oklahoma's title was defeated, is "a singular exception" to the otherwise "established line of cases" holding that title to submerged lands vests in the states at statehood. *Montana*, 450 U.S. at 555 n.5.

This Court has never held, or even intimated, that a federal withdrawal of submerged lands underlying navigable waters—as opposed to a conveyance to a third party—will defeat a state's title under the equal footing doctrine. Indeed, this Court has held that a federal withdrawal of submerged lands, prior to enactment of the Submerged Lands Act, 43 U.S.C. § 1301 et seq., did *not* defeat a state's title to those lands under the Act. *United States v. California*, 436 U.S. 32 (1978).

The submerged lands at issue in that case constituted part of the territorial sea, and therefore were not subject to the constitutional equal footing doctrine. *See United States v. California*, 342 U.S. 19 (1947). However, "[t]he very purpose of the Submerged Lands Act was to undo the effect of [the 1947 *California* decision],"[7] 436 U.S., at 37, and extend the principles of the equal footing doctrine to the submerged lands underlying the territorial sea. *United States v. Louisiana*, 363 U.S. 1, 16-24 (1960). The Court of Appeals' decision here is in conflict with this Court's determination that a pre-Submerged Lands Act federal withdrawal (like the 1889 designation of Utah Lake as a potential reservoir site) cannot defeat a state's title under that Act. More significantly, if a pre-Submerged Lands Act withdrawal has no effect on a state's statutory title, *a fortiori* a pre-statehood withdrawal cannot defeat a state's constitutional sovereign title under the equal footing doctrine.

The lower court's major error was in treating a pre-statehood federal withdrawal as tantamount to a pre-statehood conveyance to a third party. *See* 780 F.2d at 1518 (Petitioner's Appendix ("Pet. App.") at 8a-9a). The distinction between a pre-statehood conveyance of submerged lands by the United States to a third party and a pre-statehood federal withdrawal is a substantive one. *Cf. United States v. Utah*, 283 U.S. 64, 88 (1930) ("earlier Executive Order did not constitute a grant"). Where the United States has conveyed the submerged lands to a third party prior to statehood, sovereignty and ownership have been severed. Following such a conveyance, the entire "bundle of rights that are commonly characterized as property"[8] has been transferred to a third party. No attributes or aspects of ownership remain linked to sovereignty, and none of those rights remain to be transferred to the new state.

In the case of a pre-statehood federal withdrawal, however, the United States has not conveyed the lands to a third party. Instead, it has merely withdrawn them from the operation of the public

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[7] After all, prior to the 1947 *California* decision, the lands underlying the territorial sea were "assumed by many, and not without reason," to fall within the equal footing doctrine. United States v. Louisiana, 363 U.S. 1, 16 (1960).

[8] Kaiser Aetna v. United States, 440 U.S. 164, 176 (1979).

land laws. Even when reserved for a specific purpose, the federal government's title to those lands is not enhanced. *Cf. California*, 436 U.S. at [illegible] ("A reservation under the Antiquities Act thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another") (footnote omitted). Since the lands are still in federal ownership, they remain subject to the constitutional trust in favor of future states.

There is no reason to conclude, as the Court of Appeals apparently did, that a transfer of title under the equal footing doctrine and a pre-statehood federal withdrawal are wholly incompatible and the lands either pass to the state or remain irrevocably in federal ownership. The better analysis, one which harmonizes the states' constitutional right to be admitted to the Union on an equal footing and the federal government's ability to discharge its constitutional duties, is that title to the lands vests in the states at statehood, subject only to those rights surrendered to the national government in the Constitution.[9] The Court of Appeals' analysis, on the other hand, makes newly-admitted states' sovereign title hinge on whether they were admitted before or after a federal withdrawal. It would be "a perverse application of the equal-footing doctrine" if state sovereign rights depend on the date of a state's admission.[10] *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 378.

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[9] These clearly include "the paramount power of the United States to control such water for purposes of navigation in interstate and foreign commerce" under the Commerce Clause, article I, section 8, cl. 3, United States v. Oregon, 295 U.S. at 14, and possibly the Property Clause, article IV, section 3, cl. 2. E.g., Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied 455 U.S. 1007 (1982) (under Property Clause, United States can regulate use of state-owned submerged lands and waters in Boundary Waters Canoe Area).

[10] Such a result would subject a newly-admitted state to the particular federal executive policy in effect at the time of admission. For example, "95 million acres—more than one-fourth of the total area of Alaska—[was] enclosed within various types of Federal withdrawals and reservations" at the time Alaska was admitted to the Union. H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). This federal practice, widespread throughout many of the more-recently admitted states, had "been carried to extreme lengths in Alaska" such that many withdrawals were "either excessive in size or totally unnecessary." *Id.* at 6-7.

In summary, the principles underlying the equal footing doctrine require that a clear distinction be drawn between pre-statehood conveyances to third parties and pre-statehood federal withdrawals. The Court of Appeals failed to make that distinction, and its decision cannot stand in the face of this Court's prior decisions.

II

THE IMPORTANCE OF THE SOVEREIGN RIGHTS AT ISSUE WARRANTS REVIEW

In the seminal equal footing doctrine case, this Court recognized that federal ownership of lands underlying navigable waters poses a serious threat to state sovereignty while state ownership poses no threat to federal interests:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For [state sovereignty is] but municipal power, subject to the Constitution of the United states, "and the laws which shall be made in pursuance thereof."

Pollard's Lessee, 44 U.S. at 230.

The "injury" that state sovereignty might suffer from the wielding of this "weapon" by the United States goes well beyond a mere infringement of a proprietary interest. A state's sovereign title to the lands underlying navigable waters is much more than a simple property right:

> [I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892). This Court's comment in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 381, applies equally to this case: "Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." Indeed, a new state's sovereign ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission." *Louisiana*, 363 U.S. at 16 (citiation omitted).

The instant case was prompted by the United States' recent attempts to transfer interests in the bed of Utah Lake to third parties: "The controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of Interior began to issue oil and gas leases on the bed of Utah Lake—an Act that the State viewed as a violation of its ownership and property rights to the bed of Utah Lake." 780 F.2d at 1516 (Pet. App. at 2a) (footnote omitted). Similar efforts by the United States to convey lands underlying navigable waters within the boundaries of pre-statehood federal withdrawals to third parties have prompted similar cases elsewhere.[11]

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[11] Attempts by the United States to transfer submerged lands to third parties in reliance on a pre-statehood federal withdrawal are at issue in Alaska v. United States, Nos. A 83-343, A 84-435 and A 86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986 respectively), Alaska v. United States, No. A 86-110 (D. Alaska, filed February 21, 1986), Ounalashka Corp. v. Alaska, No. 77-918 (Alaska Superior Court, filed January 31, 1977), Appeal of Cook Inlet Region, Inc., No. 84-149 (Interior Board of Land Appeals, filed November 5, 1983), and Appeal of State of Alaska, No. 85-768 (Interior Board of Land Appeals, filed July 10, 1985). The United States also is asserting that a pre-statehood federal withdrawal defeated sovereign state title under the equal footing doctrine in United States v. Alaska, No. 84 Original in this Court. However, it has not yet attempted to transfer title to those lands to third parties.

Through this means, the United States threatens to erode state sovereignty and upset the delicate balance between the inherent sovereign rights of states and the powers surrendered to the national government in the Constitution. While *Pollard's Lessee* applied the equal footing doctrine only in the context of title to the beds of navigable waterbodies, it has since been employed by this Court to limit even Congress' contitutional power to impose conditions on the admission of new states into the Union:[12] "The plain deduction from [*Pollard's Lessee*] is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of Congressional legislation after admission." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The equal footing doctrine in the title navigability context is thus a cornerstone of the broader proposition, at the heart of our federal system, that all states are "equal in power, dignity and authority." *Id.* at 567.

Under the Court of Appeals' decision, however, Utah is denied the benefit of this basic principle because of pre-statehood federal executive action, an analysis which could easily be applied to other states in other contexts. This potential for altering the fundamental relationship between the states and the federal government is the reason several of the 30 *amici* states, including four of the original thirteen (Georgia, Massachusetts, New Hampshire and North Caolina), have joined in urging this Court

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[12] Article IV, § 3, cl. 1 provides: "New States may be admitted by the Congress into this Union; . . ."

to grant Utah's petition, even though the specific question presented—the effect of a pre-statehood federal withdrawal—has no direct application to them. The importance of the sovereign rights at issue, extending well beyond the merits of the instant case, warrants review by this Court.

CONCLUSION

The Court of Appeals' decision here is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine. It is not supported by any of this Court's decisions and is in direct conflict with this Court's only decisions addressing a federal withdrawal of submerged lands. Because this case presents a very basic question concerning the power of the federal government to defeat sovereign state rights under the equal footing doctrine, the Court should grant Utah's petition for certiorari.

June 1986.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1772

In the Supreme Court of the United States

October Term 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 24, 1986
CERTIORARI GRANTED OCTOBER 14, 1986

INDEX

Page

Chronological List of Relevant Docket Entries 1

Plaintiff's First Amended Complaint, filed May 7, 1980 4

Defendants' Answer to First Amended Complaint, filed May 28, 1980 8

Pre-Trial Order, filed August 27, 1980 10

Defendants' Motion for Summary Judgment, filed March 8, 1982 18

Exhibits to Motion:

A. Letter dated April 6, 1889, from J. W. Powell, Director, U.S.G.S. 19

B. Letter dated Aprl 11, 1889, from S. M. Stockslager, Commissioner of General Land Office 21

C. Letter dated April 13, 1889, from John W. Noble, Secretary of the Interior 22

D. Excerpts from Tenth Annual Report of the United States Geological Survey, 1890 23

E. Excerpts from Eleventh Annual Report of the United States Geological Survey, 1891 .. 27

Plaintiff's Cross-Motion for Summary Judgment, filed April 21, 1982 (without attachments) 39

Memorandum Opinion and Order of District Court, filed April 15, 1983 ..... Pet. App. 28a*

Page

Notice of Appeal, filed June 9, 1983 40

Opinion of Tenth Circuit Court of Appeals, filed December 26, 1985 ..... Pet. App. 1a*

Judgment of Tenth Circuit Court of Appeals, filed December 26, 1985 41

Order Granting Writ of Certiorari, filed October 14, 1986 43

*Omitted in the printing of this Joint Appendix because they appear in the printed Petition for Certiorari.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Description*
05/22/79	Complaint of Plaintiff State of Utah filed. Summons issued. Case assigned to Judge Jenkins.
08/29/79	Answer filed.
01/31/80	Request for Admission and Notice of Intent to Request Sanctions.
01/31/80	Interrogatories to Defendant United States of America.
01/31/80	Request for Production of Documents.
04/02/80	Defendants' Response to Plaintiff's Request for Admission and Notice of Intent to Request Sanctions.
04/02/80	Defendants' Response to Request for Production of Documents.
04/02/80	Defendants' Answer to Interrogatories.
04/29/80	Plaintiff's Motion for Order allowing it to file First Amended Complaint
05/07/80	Order allowing Plaintiff to file First Amended Complaint signed by Judge Jenkins 05/02/80.
05/07/80	First Amended Complaint.
05/19/80	Plaintiff's Second Set of Interrogatories.
05/28/80	Answer filed.
06/16/80	Answers to Plaintiff's Second Set of Interrogatories.
06/20/80	Plaintiff's Third Set of Interrogatories.
07/03/80	Plaintiff's Admissions of Fact and Genuineness of Documents.

Date	*Description*
07/03/80	Answers to Defendants' First Set of Interrogatories.
07/22/80	Answers to Plaintiff's Third Set of Interrogatories.
08/01/80	Motion by Plaintiff to Compel Answers to Interrogatories.
08/14/80	Supplementary Answers to Plaintiff's Second Set of Interrogatories.
08/22/80	Came before the Court for Pretrial. Pretrial Order presented to the Court. Trial set for 02/10/81 at 9:30 a.m.
08/22/80	Supplementary Answers to Plaintiff's Third Set of Interrogatories.
08/27/80	Pretrial Order signed by Judge Jenkins 08/25/80.
02/03/81	Joint Motion for Continuance of Trial.
02/03/81	Order signed by Judge Jenkins 02/03/81 resetting Trial to 06/18/81 at 9:30 a.m.
05/21/81	Came before the Court for Status Report. Counsel advised the Court of settlement negotiations. The Court vacated Trial setting of 06/18/81 at 9:30 a.m. and set it down for Status Report on 08/28/81 at 1:30 p.m.
08/28/81	Came before the Court for Status Report, Scheduling Conference and all pending Motions. Parties still negotiating settlement.
03/08/82	Defendants' Motion for Summary Judgment, Supporting Memorandum, and Exhibits 1, 2 & 3.

Date	*Description*
04/21/82	Plaintiff's Cross Motion for Summary Judgment and Supporting Memorandum.
04/27/82	Plaintiff's Errata: Memorandum in Support of Utah's Cross Motion for Summary Judgment.
05/07/82	Original Affidavits in Support of Plaintiff's Cross Motion for Summary Judgment; Supplemental Affidavit of Michael M. Quealy; attachments entitled: Report on Provo Bay Unit, 12/23/26; Report on Utah Lake Reclamation, July 1925; and Dept. of Interior U.S. Reclamation Service Report on Utah Lake Division, May 1923.
05/28/82	Amended Notice of Hearing on Motions for Summary Judgment reset for 06/10/82 at 2:00 p.m.
06/02/82	Defendants' Memorandum in Opposition to Cross Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment.
06/10/82	Came before the Court for Hearing on Motions for Summary Judgment. Matter taken under advisement.
04/15/83	Memorandum Opinion & Order signed by Judge Jenkins 04/15/83 denying Plaintiff's Cross Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment.
06/09/83	Notice of Appeal filed by Plaintiff.
12/26/85	Opinion of Tenth Circuit Court of Appeals.
12/26/85	Judgment of Tenth Circuit Court of Appeals.
10/14/86	Order granting Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

— CENTRAL DIVISION —

Civil No. C-79-0302

THE STATE OF UTAH, by and through its Division of State Lands,

Plaintiff,

v.

UNITED STATES OF AMERICA; CECIL D. ANDRUS, Secretary of the United States Department of the Interior; FRANK GREGG, Director of the Bureau of Land Management within the Department of the Interior; and GARY WICKS, Utah State Director of the Bureau of Land Management,

Defendants.

FIRST AMENDED COMPLAINT

Filed May 7, 1980

Plaintiff alleges that:

COUNT ONE

1. Plaintiff is the State of Utah and brings this action for a declaratory judgment by and through the Division of State Lands; Defendant Cecil D. Andrus is the Secretary of the United States Department of the Interior; Defendant Frank Gregg is the Director of the Bureau of Land Management within the Department of the Interior; and Defendant Gary Wicks is the Utah State Director of the Bureau of Land Management.

2. Jurisdiction of this Court is invoked under 28 U.S.C. 1331 (federal question); venue is properly laid under 28 U.S.C. 1391; the Defendants are subject to suit under 5 U.S.C. 701 *et seq.* (the Administrative Procedures Act); the relief sought is available under 28 U.S.C. 2201 *et seq.* (Declaratory Judgment Act) and 28 U.S.C. 1361 (Mandamus); and the amount in controversy exclusive of interest, attorneys' fees and costs, exceeds $10,000.00.

3. Plaintiff has the statutory responsibility under the laws of the State of Utah to manage and administer all lands owned by the State of Utah, including the beds of navigable waters.

4. Utah Lake is a body of water located wholly within the State of Utah, which was navigable on January 4, 1896, when the State of Utah was admitted into the Union of the United States of America; it has at all times since been navigable, and it now is a navigable body of water. At the date of statehood, by virtue of its admission into the Union on an equal footing with all other States, the State of Utah became the owner in a sovereign and proprietary capacity of the beds of all navigable lakes and streams located within the State of Utah. Therefore, at the date of statehood, by virtue of its admission into the Union on an equal footing with all other States, the State of Utah became the owner, has ever since been the owner, and now is the owner of the bed of Utah Lake and the Natural resources associated therewith or located therein.

5. In recent years Defendants have begun to assert, and are now asserting, unfounded and unlawful claims

to the bed of Utah Lake contrary to the title and ownership of the State of Utah, and have caused oil and gas leases to be issued to third parties covering part of the bed of Utah Lake, and have failed and refused to recognize Utah's rightful title to the bed of said Lake. The Court should enjoin Defendants from interfering with Utah's ownership and management of the bed of Utah Lake. Plaintiff has no adequate remedy at law, has no administrative remedies to exhaust, and will suffer irreparable harm if the relief requested is not granted.

6. The bed of Utah Lake consists of the area located within the ordinary high water level of the Lake, but Utah does not ask the Court to make any determination with respect to the boundary of the Lake. The sole conflict presented by this action is between Utah and the United States. Any rights and claims of third parties to the Lake or areas adjacent to the Lake shall not be affected by the relief sought in this Complaint.

COUNT II

7. Plaintiff realleges Paragraphs 1 through 6 of COUNT I as part of COUNT II.

8. As an alternative to COUNT I, Plaintiff alleges that if for any reason it did not obtain title to the bed of Utah Lake at the date of statehood, then and in that event it obtained full and complete title thereto, including all natural resources in such bed and in the waters of such Lake, on or about May 22, 1953, by virtue of the Submerged Lands Act, 43 U.S.C. §1301, *et seq.*, and particularly Section 1311(a).

WHEREFORE, Plaintiff prays:

1. That this Court adjudicate and declare that the

State of Utah is the owner of the bed of Utah Lake and the natural resources associated therewith or located therein; that the recent actions of Defendants are unlawful in asserting claims of dominion and control over, and claims of ownership to, the bed of Utah Lake; and that any rights and claims of third parties to the Lake or areas adjacent to the Lake shall not be affected by any such adjudication.

2. That this Court issue an order enjoining Defendants from interfering with Utah's ownership and management of the bed of Utah Lake and the natural resources associated therewith or located therein.

3. For such other relief as shall appear to be appropriate.

DATED this 28th day of April, 1980.

/s/ Robert B. Hansen
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Utah Attorney General

/s/ Richard L. Dewsnup
RICHARD L. DEWSNUP
Assistant Attorney General

/s/ Dallin W. Jensen
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(Certificate Of Service Omitted In Printing)

DEFENDANTS' ANSWER
Filed May 28, 1980

(Title Omitted In Printing)

FIRST DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction.

THIRD DEFENSE

This action is barred by the Statute of Limitations as provided under the Federal Quiet Title Act, 28 U.S.C. 2409a.

FOURTH DEFENSE

Any claim plaintiff may have is barred by laches.

The defendants now answer the numbered paragraphs of plaintiff's Amended Complaint as follows:

1. Admit.

2. Deny.

3. Admit that Plaintiff administers all lands owned by the State of Utah, but deny the remainder of the allegation.

4. First sentence, admit. Defendants deny all remaining allegations of this paragraph.

5. First sentence, aver that the United States owns the bed of Utah Lake and admit that defendants have issued oil and gas leases covering part of the bed of Utah Lake.

Second sentence, deny.

6. Admit.

7. Defendant has previously responded to paragraphs one through six and incorporates those responses.

8. Deny.

WHEREAS, the defendants having answered fully the allegations request that this action be dismissed and that the Court grant any other relief as may be fit and proper.

DATED this 28th day of May, 1980.

RONALD L. RENCHER
United States Attorney

/s/ Wallace Boyack
WALLACE BOYACK
Assistant United States Attorney
Attorney for Defendant United States
of America

(Certificate Of Service Omitted In Printing)

PRE-TRIAL ORDER
Filed August 27, 1980
(Title Omitted In Printing)

This matter having come before the Court on Friday, August 22, 1980, at 1:30 p.m. at a pre-trial conference held before the Honorable Bruce S. Jenkins, pursuant to Rule 16 of the Federal Rules of Civil Procedure, 38 U.S.C.; and Richard L. Dewsnup, Dallin W. Jensen and Michael M. Quealy having appeared as counsel for Plaintiff and Wallace Boyack having appeared as counsel for Defendants, the following action was taken:

1. *JURISDICTION*: Plaintiff claims that this is an action for declaratory judgment and invokes jurisdiction of the Court under 28 U.S.C. Section 1331 because the Court must construe and interpret the meaning and legal effect of the subject reservoir site segregation, and must further determine and adjudicate the applicability and effect of the Equal Footing Doctrine with respect to Utah Lake and Utah's sovereign and proprietary rights in said Lake, and must further interpret Utah's proprietary and sovereign rights under the Utah Enabling Act, 28 Stat. 107, *et seq*. As an alternative and conditional Count, to be relied on only if the Court concludes that a declaratory judgment is improper in this case, then and in that event Plaintiff seeks an adjudication under the Federal Quiet Title Act, 28 U.S.C. Section 2409a, that Utah owns the bed of Utah Lake.

Defendants claim that this Court does not have jurisdiction based on 28 U.S.C. Section 1331 as there is no federal question involved because the effect of the withdrawal is basically a factual question. Further, any legal

challenge regarding the effect of the withdrawal on the title to the bed of Utah Lake must be brought under the Quiet Title Act, 28 U.S.C. Section 2409a, by the party disputing the title of the United States. Furthermore, Defendants claim that any action brought under the Quiet Title Act by the Plaintiff is barred by the Statute of Limitations.

VENUE. Venue is laid by Plaintiff in the Central Division of the District of Utah, the statutory basis for the claim of venue being 28 U.S.C. Section 1391. Such venue was determined by the Court to be proper.

2. *GENERAL NATURE OF THE CLAIMS OF THE PARTIES.*

A. Plaintiff claims that it owns title to the bed of Utah Lake by virtue of the navigability of the Lake at statehood, and, as an alternative claim, that it obtained title on or about May 22, 1953, by virtue of the Submerged Lands Act, 43 U.S.C. Section 1301 *et seq*., and particularly Section 1311a.

B. Defendants claim that title to the bed of Utah Lake has remained in federal ownership by virtue of the selection and reservation of Utah Lake as a reservoir site on April 6, 1889, by J. W. Powell, and notice thereof was sent by letter dated April 11, 1889, from S. M. Stockslager, Commissioner of the General Land Office, to the Register and Receiver in Salt Lake City, and acknowledgment of receipt of notice of Utah Lake as a reservoir site was given by a letter dated April 13, 1889, from John W. Noble, Secretary of the Interior to J. W. Powell, Director of the United States Geological Survey.

Defendants further claim, as a procedural and jurisdictional matter, that the claims of Plaintiff are barred by the Statute of Limitations provided under the Federal Quiet Title Act, 28 U.S.C. Section 2409a; and that the claims of Plaintiff are further barred by laches.

Defendants claim that the State received no title to the lands in question by virtue of the Submerged Lands Act, 43 U.S.C. Section 1301 *et seq.*

C. All other parties' claims: No other person or entity has any known claim to the water-covered bed of Utah Lake. Private upland owners may have claims to exposed lands located between the surveyed meander line and the actual water level of the Lake, but there will be no adjudication in this action with respect to any such private claims to the exposed lands.

3. *UNCONTROVERTED FACTS.* The following facts are established by admissions in the pleadings or by stipulations of counsel:

A. The Court has jurisdiction of the parties and subject matter of this action, subject to Defendants' claims that there is no federal question and that this action is barred by the Statute of Limitations set forth in 28 U.S.C. Section 2409a.

B. On January 4, 1896 (the date of Utah's statehood) Utah Lake was "navigable-in-fact" under federal law and was susceptible of being used, in its ordinary condition, as a highway of commerce over which trade and travel may have been conducted in the customary modes of trade and travel on water, all within the meaning of *The Daniel Ball,* 10 Wall. 557, 563 (1870), as interpreted and applied in *United States v. Holt State Bank,* 270 U.S. 49 (1926); *United States v. Utah,* 283 U.S. 64 (1931); and *Utah v. United States,* 406 U.S. 484 (1972).

4. *CONTESTED ISSUES OF FACT.* The basic contested issues of fact remaining for determination relate generally (a) to the time when Plaintiff had legal notice of the selection of Utah Lake as a reservoir site and the claim by the United States that such selection was sufficient to prevent Utah from receiving title at the date of statehood in 1896 or at the date of enactment of the Submerged Lands Act in 1953, as such facts may relate to the Statute of Limitations issue; and (b) to such circumstances and events as are relevant to the issue of laches; and (c) to the respective claims of the parties to occupancy, possession, use, management, administration and control over Utah Lake from January 4, 1896, to the present time.

Defendants claim that the Contested Issues of Fact remaining for determination by the Court are as follows:

A. Whether the bed of Utah Lake was withdrawn by the United States in 1889 prior to Utah becoming a state.

B. Whether the withdrawal in favor of the United States had the effect of vesting all interest in the lands covered by the waters of Utah Lake in the United States or whether the United States has an interest in said lands only for reclamation purposes.

C. At what time did the State of Utah become aware of the interest and claim of the United States to the bed of Utah Lake?

D. Did the statehood of Utah in 1896 affect the withdrawal of the bed of Utah Lake by the United States?

5. *BASIC CONTESTED ISSUES OF LAW.*

A. Do the issues presented to the Court involve a federal question which would provide the Court with jurisdiction under 28 U.S.C. Section 1331?

B. Is a claim barred by the Quiet Title Act, 28 U.S.C. Section 2409a, even though the claim arose and the twelve-year Statute of Limitations ran prior to the enactment of the Quiet Title Act?

C. Does the withdrawal for reservoir site purposes bar a state from receiving upon statehood lands previously withdrawn by the United States that it would otherwise receive based on the Equal Footing Doctrine?

D. Did the Submerged Lands Act, 43 U.S.C. Section 1301 *et seq.*, and particularly Section 1311a, grant any interest in the bed of Utah Lake to Plaintiff, State of Utah?

E. Other issues of law, subordinate and relevant to the broad issues of law set forth above, may be raised and argued by the parties.

6. *EXHIBITS.* Plaintiff offers none at this time. If exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least fifteen days prior to trial.

Defendants intend to offer copies of the following documents which the Plaintiff has previously admitted are genuine.

A. Selection dated April 6, 1889, by J. W. Powell.

B. Notice to the Register and Receiver in Salt Lake City, Territory of Utah by Commissioner S. M. Stockslager dated April 11, 1889.

C. Letter dated April 13, 1889, from John W. Noble, United States Secretary of the Interior, to the Director of the Geological Survey.

D. The Eleventh Annual Report of the United States Geological Survey to the Secretary of the Interior, 1889-1890. Cover page and pages 183-189.

E. Letter dated January 15, 1963, from the Governor of the State of Utah, the Honorable George D. Clyde, to Stewart L. Udall, Secretary of Interior.

F. Letter dated January 13, 1963, from the Governor of the State of Utah, to U.S. Senator Frank E. Moss.

G. Letter dated February 21, 1963, from Stewart L. Udall, Secretary of the Interior, to the Governor of the State of Utah.

H. Letter dated August 15, 1963, from Stewart L. Udall, Secretary of the Interior, to the Governor of the State of Utah.

I. Memorandum Opinion dated January 26, 1965, by the Regional Solicitor, Department of the Interior.

7. *WITNESSES.*

A. In the absence of notice of at least five days to opposing counsel to the contrary, Plaintiff will call as witnesses:

Donald G. Prince, Assistant Director
Division of State Lands

Douglas F. Day, Director
Division of Wildlife Resources
Ross B. Elliott, Director
Division of Parks & Recreation

Plaintiff may call:

David Crandall
John Jensen
Palmer DeLong
(All of whom are retired employees of the U.S. Bureau of Reclamation, now known as Water and Power Resources Service)

Plaintiff will use no depositions.

B. In the absence of at least five days notice to opposing counsel to the contrary, Defendants may call:

Nelson W. Plummer
Howard Pearson
Rex Gabbitas
Michael Nelson
Ed Cox

Defendants will use no depositions.

C. In the event that other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least five days prior to trial. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony reasonably cannot be anticipated before the time of trial.

8. *REQUESTS FOR INSTRUCTIONS.* There will be no instructions since this is a non-jury trial.

9. *AMENDMENTS TO PLEADINGS.* To the

extent that this Pre-Trial Order has supplemented the pleadings, such pleadings are amended by and merged with this Pre-Trial Order.

10. *DISCOVERY.* Discovery has been completed.

11. *TRIAL SETTING.* The case is set for trial without a jury on February 10, 1981 at 9:30 o'clock a.m. Estimated length of trial is two days.

12. *POSSIBILITY OF SETTLEMENT.* None.

DATED this 25th day of August, 1980.

/s/ Bruce S. Jenkins
BRUCE S. JENKINS, Judge
August 28, 1980 United States District Court

Copies mailed to counsel:
Richard L. Dewsnup, Esq.
Wallace Boyack, Esq.

The foregoing proposed Pre-Trial Order [prior to execution by the Court] is hereby adopted this 22nd day of August, 1980.

/s/ Richard L. Dewsnup
RICHARD L. DEWSNUP
Assistant Attorney General
/s/ Dallin W. Jensen
DALLIN W. JENSEN
Assistant Attorney General
/s/ Michael M. Quealy
MICHAEL M. QUEALY
Assistant Attorney General
ATTORNEYS FOR PLAINTIFF
/s/ Wallace Boyack
WALLACE BOYACK
Assistant United States Attorney
ATTORNEY FOR DEFENDANTS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed March 8, 1982

(Title Omitted In Printing)

Come now the defendants and move the court pursuant to Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment in their favor. Summary judgment is appropriate in this case because there are no genuine issues as to any material fact and the defendants are entitled to judgment as a matter of law. Defendants' motion is based on the pleadings, discovery, affidavit of Darrell C. Barnes and exhibits thereto, and the memorandum in support of defendants' motion filed herewith, and the exhibits attached thereto.

DATED this 5th day of March, 1982.

/s/ Brent D. Ward
BRENT D. WARD
United States Attorney

/s/ Steven A. Herman
STEVEN A. HERMAN
LAWRENCE W. PUCKETT
Attorneys, Department of Justice

EXHIBIT A

April 6, 1889

Sir:

In conformity with the act approved October 2, 1888, making appropriation for the Sundry Civil expenses of the Government and of the clause thereof which appropriates:

"For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid regions and for the selection of sites for reservoirs and other hydraulic works for the storage of water for irrigation, etc."

And which farther provides that,

"All the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time hence forth hereby reserved from sale as the property of the United States and shall not be subject after the passage of this act to entry, settlement or occupation until further provided by law."

I have the honor to report that the site of Utah Lake in Utah County in the Territory of Utah is hereby selected as a reservoir site, together with all lands situate within two statute miles of the border of said lake at high water.

Pending the more accurate designation of the boundaries of the foregoing site by township, section and quarter-section lines, I respectfully recommend that the Register of the Land Office at Salt Lake City be instructed to refuse further entries of public land within the foregoing prescribed limits.

I venture to add that speedy action should be taken in this matter as any further entries of the lands adjoining Utah Lake will have a tendency to defeat the purposes of the law and obstruct the use of the lake as a natural reservoir for the irrigation of lands below its outlet.

An officer of this survey is now on the grounds making the necessary examination and surveys whereby the boundaries of the site may be designate in land office terms.

I am, with respect,
your obedient servant,

/s/ J. W. Powell, Director

4-7 pp 195-198

EXHIBIT B

"C" (Also see "C"
Nov. 4, 1891)

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D.C.

April 11, 1889

Register and Receiver,
Salt Lake City, Utah Ty.
Gentlemen:

A report has been made to the Hon. Secretary of the Interior by Director Powell of the Geological Survey under date of the 6th instant, stating "That the site of Utah Lake in Utah County, in the Territory of Utah, is hereby selected as a reservoir site, together with all lands situated within two statute miles of the border of said lake at high water."

The said report has been referred to this office by Assistant Secretary Bossey, with directions under date of the 11th instant that you be instructed to refuse further entries or filing on the lands designated, in accordance with the Act of October 2, 1888, pamphlet statutes, page 527.

You are therefore so instructed, that no entries or filing may be permitted to conflict with said selection, of which the intention is expressed to furnish as soon as practicable, a more accurate description, by legal subdivisions.

Respectfully,

/s/ S. M. Stockslager
Commissioner

EXHIBIT C

DEPARTMENT OF THE INTERIOR
Washington

April 13, 1889

The Director of the Geological Survey

Sir:

Your letter of the 6th instant, informing the Department that Utah Lake has been selected as a reservoir site in connection with the irrigation of the arid lands, and as provided for in the Sundry Civil Act of October 2, 1888, has been received. In accordance with your request that speedy action be taken in instructing the Register and Receiver at Salt Lake City to refuse further entries of lands in the limits designated, your communication was yesterday referred to the Commissioner of the General Land Office with directions to take the desired action in the premises.

Very respectfully,

/s/ John W. Noble
Secretary

3065-'89

EXHIBIT D

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY

THIS IS
GOVERNMENT PROPERTY

DO NOT REMOVE
FROM THE SURVEY OFFICE

TENTH ANNUAL REPORT
OF THE
UNITED STATES GEOLOGICAL SURVEY
TO THE
SECRETARY OF THE INTERIOR
1888-'89

BY
J. W. POWELL
DIRECTOR

PART II — IRRIGATION
WASHINGTON

GOVERNMENT PRINTING OFFICE
1890

22	Six-mile Creek Reservoir	Fremont	Six-mile Creek, Arkansas River		7	Reservoirs 22 and 23.
23	Eight-mile Creek Reservoir	do	Eight-mile Creek, Arkansas River			
24	Upper Clear Creek Reservoir	Chaffee	Clear Creek, Arkansas River		5	
25	Cottonwood Lake Reservoir	do	Little Cottonwood River		4	
	Total				185¼	

UTAH.

1	Utah Lake	Utah	Jordan River, Salt Lake			All lands situate within 2 statute miles of lake at high water.
2	Gunnison Reservoir	San Pete	San Pitch River		5	Do.
3	Bear Lake Reservoir	Rich Bear Lake†	Bear River, Salt Lake		(‡)	
4	Deseret Reservoir	Millard	Sevier River		6	
5	Cottonwood Creek Reservoir	Salt Lake	Cottonwood Creek		14	
6	Panquitch Hayfield, Upper Reservoir	Garfield	East Fork, Sevier River		8	
7	Plateau Valley Reservoir	do	do		5	
8	Panquitch Lake Reservoir	Iron	West Fork, Sevier River		14	
9	Marysvale Reservoir	Pi Ute	Sevier River		11	
10	Otter Creek Reservoir	do	East Fork, Sevier River		12	
	Total				§75	

NEW MEXICO.

1	Lake Constance Reservoir	Dona Ana	Rio Grande		252	Seven townships.—All public lands on the right bank of the Rio Grande between the Mexican boundary and a point 20 miles above that boundary line and extending 4 miles west of said right bank, reserved from entry and sale.
2	San Ildefonso, No. 1, upper site	Bernalillo	do	150,000		In San Ildefonso and Santa Clara Pueblo Grants.
3	San Ildefonso No. 2	do	do			
4	San Felipe Reservoir	do	do	125,000		Nearly all in San Felipe and Santo Domingo land grants.
5	San Marcial	Sierra	do	360,000	56	85 miles below San Marcial.
6	(Rio Grande)	do	do	140,000	80	On Rio Grande between Rio Palomas and Rio Pirches.
7	Hot Springs (military reservation)	Socorro	Alamosa Creek	35,000	6	Covers good portion of Hot Springs military reservation.
8	Small reservoir, T.7S.,R.7W	do	do		4	
9	Small reservoir, T.2N.,R.4W	do	do		4	
10	Small reservoir, T.6N.,R.7W	Valencia	Rio Colorado, San Jose River		8	

*Exclusive of Clear Lake †Bear Lake County, Idaho. ‡860 approximately. §Exclusive of Utah and Bear Lakes.

difficulty was experienced in finding suitable cross-sections owing to the torrential character of the streams and to many obstructions presented by dams and other obstacles caused by the use of these rivers for floating logs, lumber, fire-wood and railroad ties. The season also was unfavorable. An exceptional storm in May caused the river to rise prematurely and before that event was expected and before the stations had been fully established. With the exception of this storm the season was almost unprecedently dry and after it was over the river quickly fell, so that in some of them the record of river heights became unsatisfactory because there was so little water to measure. Stations, however, were established at Essex, Nev., and a record kept by which the daily mean discharge has been calculated from May 21. The flows of the tributaries were also gauged repeatedly in Prosser, Juniper, Grey, Bronco Martis, Squaw, Coldstream, and Dog Creeks, and on the Little Truckee. The Carson River was examined and gauging begun in June near Genoa, and on the west fork of the Carson below Hope Valley.

HYDROGRAPHIC WORK IN UTAH.

In April Mr. Newell was sent to Utah to make certain examinations of Utah Lake with reference to its capacity for a reservoir site and to furnish the specifications for its withdrawal as such under the law, so far as the lands covered or overflowed by it or the lands bordering upon it were still public lands. Having completed this work it became evident that his services for hydrographic investigation were so urgently demanded and so greatly needed

that it seemed as if no more useful station could be selected. He was therefore instructed to begin the gauging of the principal streams and to carry on systematic hydrographic work in those portions of the territory which were readily accessible. Beginning with the Bear River, a station was located at the lower end of the canyon where it enters Malade Valley, and one has since been placed above Cache Valley at Battle Creek. At all of the principal streams which flow from the Wasatch into the Salt Lake basin observations and gaugings have been begun, including Provo River, American and Spanish Forks. Stations were established and gauged in the fertile Sevier Valley at Joseph City and at Leamington. An evaporation station has also been well maintained at Fort Douglas. Mr. Newell has also collected a large amount of statistical information concerning the water-supply, canals and irrigation of Utah, and accomplished the segregation of the irrigable lands in Bear River valley.

SNAKE RIVER.

Mr. J. B. Williams was assigned to the hydrographic work in Idaho, with Mr. L. D. Hopson as an assistant. Prior to this assignment he had been sent to El Paso to establish the important station there, and

EXHIBIT E

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY

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ELEVENTH ANNUAL REPORT
OF THE
UNITED STATES GEOLOGICAL SURVEY
TO THE
SECRETARY OF THE INTERIOR
1889-'90

BY
J. W. POWELL
DIRECTOR

PART II—IRRIGATION

WASHINGTON

GOVERNMENT PRINTING OFFICE
1891

		Acres.	Acres.
Section 35	SW. ¼ of the NW. ¼	40	
	W. ½ of the SW. ¼	80	
			120
	T. 11 N., R. 20 E., Mount Diablo meridian.		
Section 2	W. ½ of the NW. ¼	80.20	
Section 3	All of the NE. ¼	159.74	
	All of the SE. ¼	160	
	All of the NW. ¼	158.58	
	All of the SE. ¼	160	
			638.32
Section 4	NE. ¼ of the NE. ¼	39.15	
	S. ½ of the NE. ¼	80	
	All of the SE. ¼	160	
			279.15
Section 9	All of the NE. ¼	160	
Section 10	All of the NE. ¼	160	
	NW. ¼ of the SE. ¼	40	
	N. ½ of the NW. ¼	80	
	SE. ¼ of the NW. ¼	40	
			320
Total area segregated			1,797.67

UTAH.

In Utah, in addition to the general reconnaissance of the storage facilities at the headwaters of the Sevier River and other streams, a careful survey was made of Utah Lake. This survey, run by level and transit around the lake, was for the purpose of determining the area which would be covered by damming or holding back

the flood water. A description of the location and physical features of this body of water is to be found in this report under the head of Hydrography, and it will suffice to state here that after a careful study it was found that, on account of the excessive evaporation from such an enormous surface, the lake was too large to act in an economical manner as a storage reservoir. On the other hand, while it may not be advisable to hold back the water to a point above that of the average height, yet there is sufficient evidence to show that natural forces at times may raise the water level and increase the area to abnormal proportions by backing water over the great fringing marshes on the east and south. This land being, therefore, the natural flood ground of the lake,

should be reserved up to the high-water line. Accordingly, the segregation, as shown on Pl. XCV and given in the following lists, was made to include not only the bed but the lowlands up to mean high water.

Utah Lake Reservoir System.

T. 5 S., R. 1 W., Salt Lake meridian.

		Acres.
Section 23	All of the E. ½	320
Section 24	Entire section	640
Section 25	Entire section	640
Section 35	All of the E. ½	320
Section 36	Entire section	640

T. 6 S., R. 1 W.

Section	1	All of the NW. ¼	160
		All of the E. ½	320
			480
Section	12	All of the NE. ¼	160

T. 7 S., R. 1 W.

Section	13	All of the SE. ¼	160
Section	23	All of the SE. ¼	160
Section	24	Entire section	640
Section	25	Entire section	640
Section	26	Entire section	640
Section	34	All of the E. ½	320
Section	35	Entire section	640
Section	36	Entire section	640

T. 8 S., R. 1 W.

Section	1	Entire section	640
Section	2	Entire section	640
Section	3	Entire section	640
Section	4	All of the E. ½	320
Section	9	All of the E. ½	320
Section	10	Entire section	640
Section	11	Entire section	640
Section	12	Entire section	640
Section	13	Entire section	640
Section	14	Entire section	640
Section	15	Entire section	640

(MAP OMITTED)

			Acres.
Section	16	All of the E. ½	320
Section	22	All of the NW. ¼	160
		All of the E. ½	320
			480
Section	23	Entire section	640
Section	24	Entire section	640
Section	25	Entire section	640
Section	26	Entire section	640
Section	27	All of the E. ½	320
Section	34	All of the E. ½	320
Section	35	Entire section	640
Section	36	Entire section	640

T. 9 S., R. 1 W.

Section	1	Entire section	640
Section	2	Entire section	640
Section	3	All of the SE. ¼	160
Section	10	All of the E. ½	320
Section	11	Entire section	640
Section	12	Entire section	640
Section	13	Entire section	640
Section	14	Entire section	640
Section	15	Entire section	640
Section	22	All of the E. ½	320
Section	23	Entire section	640
Section	24	Entire section	640
Section	26	All of the N. ½	320
Section	27	All of the NE. ¼	160

T. 5 S., R. 1 E.

Section	19	All of the S. ½	320

Section 20	All of the S. ½	320
Section 21	All of the S. ½	320
Section 26	All of the SW. ¼	160
Section 27	Entire section	640
Section 28	Entire section	640
Section 29	Entire section	640
Section 30	Entire section	640
Section 31	Entire section	640
Section 32	Entire section	640
Section 33	Entire section	640
Section 34	Entire section	640
Section 35	Entire section	640
Section 36	Entire section	640

T. 6 S., R. 1 E.

		Acres.
Section 1	Entire section	640
Section 2	Entire section	640
Section 3	Entire section	640
Section 4	Entire section	640
Section 5	Entire section	640
Section 6	Entire section	640
Section 7	Entire section	640
Section 8	Entire section	640
Section 9	Entire section	640
Section 10	Entire section	640
Section 11	Entire section	640
Section 12	Entire section	640

Section 13	Entire section		640
Section 14	Entire section		640
Section 15	Entire section		640
Section 16	Entire section		640
Section 17	Entire section		640
Section 18	All of the NW. ¼	160	
	All of the E. ½	320	
			480
Section 19	All of the NE. ¼		160
Section 20	Entire section		640
Section 21	Entire section		640
Section 22	Entire section		640
Section 23	Entire section		640
Section 24	Entire section		640
Section 25	Entire section		640
Section 26	Entire section		640
Section 27	Entire section		640
Section 28	Entire section		640
Section 29	Entire section		640
Section 32	Entire section		640
Section 33	Entire section		640
Section 34	Entire section		640
Section 35	Entire section		640
Section 36	Entire section		640

T. 7 S., R. 1 E.

Section 1	Entire section	640
Section 2	Entire section	640
Section 3	Entire section	640
Section 4	Entire section	640
Section 5	Entire section	640
Section 6	All of the SE. ¼	160

		Acres.
Section 7	All of the E. ½	320
Section 8	Entire section	640
Section 9	Entire section	640
Section 10	Entire section	640
Section 11	Entire section	640
Section 12	Entire section	640
Section 13	Entire section	640
Section 14	Entire section	640
Section 15	Entire section	640
Section 16	Entire section	640
Section 17	Entire section	640
Section 18	Entire section	640
Section 19	Entire section	640
Section 20	Entire section	640
Section 21	Entire section	640
Section 22	Entire section	640
Section 23	Entire section	640
Section 24	Entire section	640
Section 25	Entire section	640
Section 26	Entire section	640
Section 27	Entire section	640
Section 28	Entire section	640
Section 29	Entire section	640
Section 30	Entire section	640
Section 31	Entire section	640
Section 32	Entire section	640
Section 33	Entire section	640
Section 34	Entire section	640
Section 35	Entire section	640

Section 36	Entire section	640

T. 8 S., R. 1 E.

Section 1	Entire section	640
Section 2	Entire section	640
Section 3	Entire section	640
Section 4	Entire section	640
Section 5	Entire section	640
Section 6	Entire section	640
Section 7	Entire section	640
Section 8	Entire section	640
Section 9	Entire section	640
Section 10	All of the N. ½	320
Section 11	Entire section	640
Section 12	Entire section	640
Section 13	Entire section	640
Section 14	Entire section	640

		Acres.
Section 16	All of the NW. ¼	160
Section 17	Entire section	640
Section 18	Entire section	640
Section 19	Entire section	640
Section 20	Entire section	640
Section 23	All of the N. ½	320
Section 24	All of the N. ½	320
Section 29	All of the W. ½	320
Section 30	Entire section	640
Section 31	Entire section	640

Section 32	All of the W. ½	320

T. 9 S., R. 1 E.

Section 5	All of the W. ½	320
Section 6	Entire section	640
Section 7	Entire section	640
Section 17	All of the W. ½	320
Section 18	Entire section	640
Section 19	Entire section	640
Section 20	Entire section	640

T. 5 S., R. 2 E.

Section 31	All of the S. ½	320

T. 6 S., R. 2 E.

Section 6	Entire section	640
Section 7	Entire section	640
Section 18	Entire section	640
Section 19	Entire section	640
Section 20	All of the S. ½	320
Section 28	All of the SW. ¼	160
Section 29	Entire section	640
Section 30	Entire section	640
Section 31	Entire section	640
Section 32	Entire section	640
Section 33	All of the NW. ¼	160
	All of the S. ½	320
		480

T. 7 S., R. 2 E.

Section 3	All of the W. ½	320
Section 4	Entire section	640
Section 5	Entire section	640
Section 6	Entire section	640
Section 7	Entire section	640

		Acres.
Section 8	Entire section	640
Section 9	Entire section	640
Section 10	All of the NW. ¼	160
	All of the S. ½	320
		480
Section 13	Entire section	640
Section 14	Entire section	640
Section 15	Entire section	640
Section 16	Entire section	640
Section 17	Entire section	640
Section 18	Entire section	640
Section 19	Entire section	640
Section 20	Entire section	640
Section 21	Entire section	640
Section 22	Entire section	640
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Section 24	Entire section	640
Section 25	Entire section	640
Section 26	Entire section	640
Section 27	Entire section	640
Section 28	Entire section	640
Section 29	Entire section	640
Section 30	Entire section	640
Section 31	Entire section	640
Section 32	Entire section	640
Section 33	Entire section	640
Section 34	Entire section	640
Section 35	Entire section	640
Section 36	Entire section	640

T. 8 S., R. 2 E.

Section	4	All of the N. ½	320
Section	5	Entire section	640
Section	6	Entire section	640
Section	7	Entire section	640
Section	8	All of the W. ½	320

T. 7 S., R. 3 E.

Section	18	Entire section	640
Section	19	Entire section	640
Section	20	All of the W. ½	320
Section	30	All of the NE. ¼	160
		All of the W. ½	320
			480

Total area segregated, 125,440 acres.

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Filed April 21, 1982

(Title Omitted In Printing)

Plaintiff moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in accordance with the prayer of the Complaint and the position of Plaintiff set forth in the Pre-Trial Order. There is no material fact in controversy, and Plaintiff is entitled to judgment as a matter of law.

This Motion is based on the pleadings and discovery on file, on a Memorandum of Law filed in support hereof, and on affidavits of Mark H. Crystal, Douglas F. Day, Ross B. Elliott, Norman V. Hancock, Dee C. Hansen, Glen B. Hatch, Scott M. Matheson, Ralph A. Miles, Donald Gail Prince, Michael M. Quealy, and Calvin L. Rampton, and the documents identified therein or attached thereto.

Dated this 21st day of April, 1982.

DAVID L. WILKINSON
Utah Attorney General

/s/ Richard L. Dewsnup
RICHARD L. DEWSNUP
Assistant Attorney General

/s/ Dallin W. Jensen
DALLIN W. JENSEN
Assistant Attorney General

/s/ Michael M. Quealy
MICHAEL M. QUEALY
Assistant Attorney General

Attorneys for Plaintiff, State of Utah

(Certificate Of Service Omitted In Printing)

NOTICE OF APPEAL
Filed June 9, 1983

(Title Omitted In Printing)

Notice is hereby given that the State of Utah, by and through its Division of State Lands, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order granting Defendants' Motion for Summary Judgment on the merits and denying Plaintiff's Motion for Summary Judgment entered in this action on the 15th day of April, 1983.

DATED this 9th day of June, 1983.

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(Certificate Of Service Omitted In Printing)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM - December 26, 1985

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable James K. Logan, Circuit Judges.

THE STATE OF UTAH, by and through its
Division of State Lands,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
WILLIAM CLARK, Secretary of the Department of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management;
Defendants-Appellees.

JUDGMENT

No. 83-1731

(D.C. No. C-79-0302J)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk
By /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

A true copy

Teste

Howard K. Phillips
Clerk U.S. Court of
Appeals, Tenth Circuit

By /s/ Kathy Havens
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 85-1772

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,

Respondents.

ORDER ALLOWING CERTIORARI.

Filed October 14, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1772

In the Supreme Court of the United States

October Term 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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December 12, 1986

QUESTIONS PRESENTED

Utah Lake is a navigable body of water whose bed Utah claims under the Equal Footing Doctrine. The United States claims the lakebed because the United States Geological Survey made a pre-statehood withdrawal of the Lake as a reservoir site. The purported authority for the withdrawal was the Sundry Appropriations Act of 1888, which did not specify the reservoir sites to be withdrawn and did not refer to sovereign lands.

The questions presented are:

1. Whether the provisions of the 1888 Act defeat Utah's entitlement to the bed of Utah Lake under the Equal Footing Doctrine.

2. Whether the administrative withdrawal was statutorily authorized and, if so, whether the withdrawal is sufficient to defeat Utah's sovereign ownership.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. THE EQUAL FOOTING DOCTRINE GIVES UTAH OWNERSHIP OF THE BED OF UTAH LAKE AS A MATTER OF CONSTITUTIONAL RIGHT 10

A. The Constitutional Standard 10

1. Basis and Nature of the Equal Footing Doctrine 10

2. The Equal Footing Doctrine Imposes a "Strong Presumption" in Favor of State Title and Imposes Trust Responsibilities on the United States .. 12

3. There is Only a Very Narrow Exception to the Equal Footing Doctrine 14

B. The Withdrawal of Utah Lake Does Not Satisfy the Constitutional Standard 16

1. A State's Equal Footing Title can be Defeated Only by a Congressional Title Conveyance 16

Page

2. The 1888 Act Authorized No Action on Sovereign Lands 21

a. The Act's Terms Show It Applied Only to Public Lands, Not Sovereign Lands 21

b. The Act Addressed a Problem Only on the Public Domain 25

C. There was No Public Exigency Involving the Bed of Utah Lake 31

II. UTAH'S EQUAL FOOTING TITLE IS AS STRONG AS ANY THIS COURT HAS EVER UPHELD 34

CONCLUSION 39

TABLE OF AUTHORITIES

Cases: **Page**

Barker v. Harvey, 181 U.S. 481 (1901) 23, 24

Borax, Ltd. v. Los Angeles,
296 U.S. 10 (1935) 13, 24, 29

California v. United States,
438 U.S. 645 (1978) 24, 25, 27, 29

Choctaw Nation v. Oklahoma, 397 U.S.
620 (1970) 15, 16, 17, 18, 20, 22, 34, 36

Coyle v. Smith, 221 U.S. 559 (1911) 12

Hardin v. Jordan, 140 U.S. 371 (1891) 11

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892) 24

Knight v. United Land Ass'n.,
142 U.S. 161 (1891) 13, 16

Mann v. Tacoma Land Co.,
153 U.S. 273 (1894) 22, 24, 30

Martin v. Waddell, 16 Pet. (41 U.S.)
367 (1842) 10, 11, 13, 14, 15, 35

Montana v. United States, 450 U.S. 544 (1981) 6
7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 21, 32, 34, 35, 36, 38

Morton v. Mancari, 417 U.S. 535 (1974) 36

Newhall v. Sanger, 92 U.S. 761 (1875) 24

Oregon v. Corvallis Sand & Gravel Co.,
429 U.S. 363 (1977) 13

Packer v. Bird, 137 U.S. 661 (1891) 15, 35

Page

Pollard's Lessee v. Hagan, 3 How. (44 U.S.)
212 (1845) 10, 11, 12, 13, 14, 18, 23, 34, 37

Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130
(1947), on rhg. 111 Utah 68, 181 P.2d 213
(1947), and on second appeal after remand,
117 Utah 507, 217 P.2d 577 (1950) 3

Shively v. Bowlby, 152 U.S. 1 (1894) 10, 12, 31, 32

State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927) 3

U.S. v. California, 436 U.S. 32 (1978) 19

U.S. v. Holt State Bank,
270 U.S. 49 (1926) 14, 15, 18, 22, 32, 35, 37

U.S. v. Oregon, 295 U.S. 1 (1935) 32

U.S. v. Utah, 283 U.S. 64 (1931) 17

Constitution and Statutes:

U.S. Constitution, art. I, §8 11

U.S. Constitution, art. III, §2 11

28 U.S.C. 1254(1) 2

28 U.S.C. 1331 4

28 U.S.C. 2201 4

28 U.S.C. 2409a 4

43 U.S.C. 1311 ..... 3, 19

25 Stat. 505 (Sundry Appropriations
Act of 1888) ..... *passim*

26 Stat. 391 29

Page

26 Stat. 1101 29

28 Stat. 107 ..... 10, 37, 38

29 Stat. 599 29

Miscellaneous:

19 Cong. Rec. 7013, 7015-16, 7018-19, 7021-24, 7026-31 (1888) 27, 28

21 Cong. Rec. 9155 (1890) 29

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Inventory of the County Archives of Utah, No. 25, Utah County (Provo), Utah Historical Records Survey, p. 11 (Sept. 1940) 33

Report of Irr. Inv. in Utah, U.S.D.A. Bull. 124, pp. 63-66 (1903) 33

No. 85-1772

In the Supreme Court of the United States

October Term 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 780 F.2d 1515 (Pet. App. 1a-27a). The opinion of the United States District Court for the Central Division of Utah (Jenkins, D.J.) is reported at 624 F.Supp. 622 (Pet. App. 28a-41a).

JURISDICTION

The Tenth Circuit on December 26, 1985, entered a judgment and an opinion affirming the District Court's summary judgment quieting title to the bed of Utah Lake in the United States (J.A. 41; Pet. App. 27a). No petition for rehearing was sought. On March 12, 1986, Justice White ordered that the time for filing the petition for writ of certiorari be extended to and including April 25, 1986. The certiorari petition was timely filed, and was granted October 14, 1986 (J.A. 43). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-27, states in relevant part:

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. * * * And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by

> such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law:
>
> *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

STATEMENT

This case determines whether Utah or the United States owns the bed of Utah Lake, the State's largest freshwater, navigable lake.[1] Utah has relied on the Equal Footing Doctrine for title to this 150-square-mile natural resource since its statehood date, January 4, 1896. Since that date, Utah has exercised its ownership of the Lake through use, management, control[2] and judicial declaration.[3]

In 1976 the Bureau of Land Management issued oil and gas leases on the lakebed. That, in Utah's view, violated the State's sovereign title. After negotiations failed to resolve the dispute, Utah filed this action in the district court. The State sought quiet title and declaratory relief, as well as confirmation of title under the Submerged Lands Act, 43 U.S.C. 1311. Jurisdiction was

---

[1] "[T]here is no dispute that Utah Lake is a navigable body of water." (Pet. App. 8a). See also Pre-Trial Order (J.A. 12-13).

[2] R. Vol. IV, Tabs A-K.

[3] State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927); and Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947), **on rhg.**, 111 Utah 68, 181 P.2d 213 (1947), **and on second appeal after remand,** 117 Utah 507, 217 P.2d 577 (1950). These cases, however, did not have the United States as a party and did not address the issues presented here.

under 28 U.S.C. Sections 1331, 2201, and 2409a (J.A. 4 & 10). Following discovery and a pre-trial hearing, the dispute was submitted to the district court on cross-motions for summary judgment (J.A. 18 & 39). The United States prevailed (Pet. App. 41a). Utah appealed (J.A. 40), and the Tenth Circuit affirmed (Pet. App. 1a). Utah then sought a writ of certiorari, which this Court granted October 14, 1986 (J.A. 43).

The United States' claim to the lakebed depends on a purported withdrawal of Utah Lake by the United States Geological Survey ("USGS"). USGS made the withdrawal in 1889, asserting authority under the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27 (quoted in relevant part *ante* at 2-3), which authorized USGS to select "sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals," in "the arid region of the United States." Lands selected were, by the Act's terms, reserved from sale as the property of the United States, and were no longer open to entry, settlement, or occupation; however, a proviso gave the President discretion to "open any portion or all of the lands reserved by this provision to settlement under the homestead laws." 25 Stat. 527. Nothing in the Act referred to sovereign lands (*i.e.*, beds of navigable waters), and there was no mention of Utah Lake.

Congress passed the Act to counter a particular problem on the public domain.[4] Land speculators, commonly called "land-grabbers," were using public-land laws to preempt, exploit and monopolize public lands. The problem was widespread, and Congress was especially concerned that monopolists would gain ownership or control of public lands that were most easily irrigated or suitable as reservoir sites. For by monopolizing these most useful lands, the speculators (individuals, syndicates and corporations) could control the benefits of water. And that would jeopardize future settlement.

[4] The 1888 Act's legislative history clearly shows the problem and Congress's intentions in solving the problem. The problem is more fully discussed, with citations, in part I.B.2.b. of the Argument.

To remedy the problem, Congress passed the 1888 Act to preclude entrymen from those particular public lands. It authorized USGS to survey the "arid region of the United States" to determine which public lands could be redeemed by irrigation and which were suitable reservoir sites. And it authorized USGS to select suitable reservoir, ditch and canal sites and the lands that could be irrigated from those improvements. Their selection withdrew or reserved those sites from entry under the land laws, keeping them safe from monopolists and preserving them for more orderly disposition. The Act had the effect of suspending operation of the land laws on the selected lands.

USGS used its authority under the Act to withdraw large areas of the public domain. Unfortunately, in the case of Utah Lake at least, USGS also assumed authority to withdraw sovereign lands; in 1889 it withdrew Utah Lake as a reservoir site. And although it has never used the Lake as a reservoir site, the United States now claims the lakebed because of the withdrawal.

The Tenth Circuit held (1) that the 1888 Act authorized the withdrawal of sovereign lands, and that in 1889 USGS withdrew the lakebed and thereby defeated Utah's Equal Footing title; and (2) that the Submerged Lands Act did not confirm Utah's title.

A principal reason the lower court gave for its decision was the 1888 Act's silence about sovereign lands. The court found authority for the Utah Lake withdrawal by interpreting the Act as "impos[ing] no restriction * * * on the type of lands that could be designated or selected." (Pet. App. 15a.) Using that rationale, the court concluded Utah could not have title because the "terms of the Act excluded [no] beds of navigable waters" from USGS selection. *Id.* The court also found the Act's facilitation of irrigation was "a public purpose motivated by a public exigency," which it held was enough to defeat sovereign title under the "public exigency" test (Pet. App. 23a). The fact that settlers could irrigate from the Lake was, in the court's view, reason to deny Utah's title in the lakebed. *Id.*

SUMMARY OF ARGUMENT

Utah asserts title to the bed of Utah Lake under the Equal Footing Doctrine. For over 140 years the Doctrine has assured that each State owns the lands beneath navigable waters (sovereign lands) within its jurisdiction. The Doctrine strictly protects State title. The Doctrine's lone exception is for pre-statehood title conveyances, *Montana v. United States*, 450 U.S. 544, 551-52 (1981), but it is very narrow and difficult to prove, and has applied only once, under unusual circumstances and specific language of conveyance. *Id.* at 555 n. 5. The narrow exception applies only after its proponent's case passes several stringent tests designed to insure that State title is not easily defeated.

The exception requires that Congress have conveyed the sovereign land to meet a public exigency. And such intention may not be lightly inferred. Indeed, there is a "strong presumption" against any such conveyance. *Id.* at 552, 554. Title passes to the State unless Congress has very clearly and definitely expressed its intention to convey, *id.* at 552, 554-55; a relevant public exigency is evident, *id.* at 552, 556; and the United States' proof overcomes the "strong presumption." In this case the United States cannot defeat the State's Constitutional entitlement.

The United States alleges no conveyance of lakebed title to any third party, but relies merely on the pre-statehood withdrawal or reservation itself. But the Constitution will not permit a State's sovereign title to be defeated except by a pre-statehood title conveyance from the United States to some third party for a public exigency. If the United States' title was not extinguished in that manner before statehood, the new State takes title as an incident of statehood. That is the Equal Footing Doctrine.

Under existing law, the United States cannot prevail. So, what the United States really seeks is a new exception that would disregard the conveyance requirement and give primacy to withdrawals and reservations

over a State's Constitutional entitlement. Nothing justifies such a change in Constitutional law. And there are also other reasons State title cannot be denied here.

The United States asserts the Sundry Appropriations Act of Oct. 2, 1888, as authority for the purported USGS withdrawal of the lakebed. But the Act does not refer to Utah Lake or any sovereign land and applies only to public lands. That is clear from the Act's plain words and its legislative history.

By holding that the withdrawal was authorized to defeat State title, the Tenth Circuit created several important problems. First, it reversed the "strong presumption" of State title, which can be overcome only if Congress "definitely declared or otherwise made [very] plain," "in clear and especial words," its intention to convey the sovereign land for a public exigency. *Montana,* 450 U.S. at 552. But the Act contains no plain and affirmative language about either sovereign lands or a conveyance. In fact, the court denied State title *because* the Act does not refer to sovereign lands (Pet. App. 15a). That totally inverts the standard and presumption, and such a construction should not defeat the State's Constitutional entitlement.

At the same time, the lower court effaced the Constitutional distinction between public lands and sovereign lands. The court construed the Act's references to public lands as giving USGS authority also over sovereign lands, and thereby effectively equated the two classes of land. If that demotion of sovereign lands were to stand, it

could radically affect State sovereignty, federal-state relationships, and land ownership, classification and administration.

The lower court also failed to require proof that the sovereign land was needed to meet a "public exigency." *Montana,* 450 U.S. at 552, 556. Instead, it found State title was defeated because the 1888 Act facilitated irrigation, which it concluded was "a public purpose motivated by a public exigency."

The court not only changed this standard (again against the State's interest), but also reached a conclusion that would be illogical under any standard. For, irrigation had nothing to do with the lakebed, nor a fortiori with ownership of the lakebed. Settlers had been around and near the Lake for decades by the time the 1888 Act was passed, and they irrigated without regard to the lakebed or its ownership.

The court also failed to respect the fact the United States was required to hold the lakebed in trust for the future State. As trustee, the United States had special duties toward its beneficiary, the State of Utah. If not reversed, the decision below will have effectively eviscerated what has always been a Constitutional trust obligation.

The Equal Footing Doctrine assures Utah's title in Utah Lake. Utah's title here is as strong as any this Court has ever upheld. All of this Court's Equal Footing decisions accord with Utah's situation, and there is no basis nor justification for creating a new exception to defeat Utah's title.

ARGUMENT

I. THE EQUAL FOOTING DOCTRINE GIVES UTAH OWNERSHIP OF THE BED OF UTAH LAKE AS A MATTER OF CONSTITUTIONAL RIGHT.

A. THE CONSTITUTIONAL STANDARD

1. *Basis and Nature of the Equal Footing Doctrine*

The States' equal and "inherent" sovereignty, *Shively v. Bowlby*, 152 U.S. 1, 43 (1894), underlies the Constitution and its Equal Footing Doctrine. Utah was "admitted into the Union on an equal footing with the original States." Act of July 16, 1894, 28 Stat. 107 (Utah Enabling Act). On its statehood date (January 4, 1896), Utah became a sovereign just like each original State, which had become independently sovereign as of the American Revolution. *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 410 (1842); *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212 (1845).

The original States succeeded to England's rights, title, dominion and sovereignty in America, which included ownership of all navigable waters and the land under them (sovereign lands). *Martin v. Waddell*, 16 Pet. at 410. All incidents of sovereignty passed immediately and automatically: "[T]he prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in [each] state." *Id.* at 416. Each State took title to all beds of navigable waters within its jurisdiction, and that

title vested as a matter of sovereignty. *Id.* at 410; *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

When the original States confederated, forming a government of the United States and placing the Constitution at its head, each State remained a full and independent sovereign. The States reserved all rights and powers except those they chose to surrender to the federal government under the Constitution. They kept ownership of their navigable waters and sovereign lands. While they granted the federal government power to regulate the waters as an incident of commerce (U.S. Constitution, art. I, §8) and admiralty (art. III, §2), that did not reduce each State's title in sovereign lands. *Martin v. Waddell*, 16 Pet. at 410.

Other States were created and admitted to the Union on an equal basis with the original States. *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212 (1845), established the non-original States' title in their sovereign lands. One party claimed title from the State (Alabama) and the other under a United States patent. The question was whether Alabama's rights and title would prevail even though it was not an original State and its territory before statehood had been owned by the United States. *Id.* at 220, 228.

The United States' patentee argued that certain language in the enabling legislation (a "compact" between the two sovereigns) gave the United States ownership of both sovereign lands and public-domain lands. *Id.* at 221. The Court disagreed, holding that "Alabama has been admitted into the union on an equal footing with

the original states, the constitution, laws, and compact, to the contrary notwithstanding." "[T]o Alabama belong the navigable waters, and soils under them, * * * subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." *Id.* at 229.

Thus was the Equal Footing Doctrine established; and today, over 140 years later, it remains a vital part of Constitutional law. *Montana v. United States*, 450 U.S. 544 (1981). The Union "was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

"[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Id.* at 580.

2. *The Equal Footing Doctrine Imposes a "Strong Presumption" in Favor of State Title and Imposes Trust Responsibilities on the United States.*

Equal Footing rights spring from the States' "inherent sovereignty," *Shively v. Bowlby*, 152 U.S. 1, 43 (1894), and from their reservation of those rights. States have title to their sovereign lands under "the Constitution itself," so title does not depend on Con-

gress's graces. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Because it is a Constitutional right, State title is *presumed*. Indeed, "A court deciding a question of title to the bed of a navigable water must, therefore, begin with a *strong presumption*" in favor of State title. *Montana, supra*, 450 U.S. at 552 (emphasis added). The presumption can be overcome only upon proof that the narrow exception to the Equal Footing Doctrine applies. The exception consists of strict tests that, in this Court's holdings, have been satisfied only once. (We discuss the exception below.)

As another result of the States' Constitutional equality, and "as an incident of sovereignty," *Montana v. United States*, 450 U.S. at 551, citing *Martin v. Waddell*, 16 Pet. at 409-11, the United States is required to hold sovereign lands in trust for the future State that will own them. The trust has been part of the Equal Footing Doctrine from the first. *Pollard's Lessee*, 3 How. at 222; *Knight v. United Land Assoc.*, 142 U.S. 161, 183 (1891); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935).

As in any trust relationship, the United States, as trustee, is very restricted in what it may do with the trust property. The United States must hold sovereign lands for the beneficiary's benefit, and must act faithfully as a fiduciary. But the United States' trust obligations regarding sovereign lands only begin with the general trust principles all trustees must obey; for the Constitution it-

self imposes additional protections, restrictions, and a presumption in favor of State title. This is no regular trust, for to violate it is to violate the Constitution itself.

3. *There is Only a Very Narrow Exception to the Equal Footing Doctrine.*

Montana v. United States is this Court's most recent Equal Footing decision. It strongly reaffirms the Doctrine as it was established in *Martin v. Waddell* and *Pollard's Lessee v. Hagan* and their progeny. It explains that "The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551. It also acknowledges that "It is now established, however, that *Congress* may sometimes *convey* lands below the high-water mark of a navigable water, and so defeat the title of a new State." *Id.* (emphasis added; brackets and indication of internal quotation omitted).

Thus, there is an exception to the general rule of State title. However, (as is seen from the quote immediately above) the exception applies only to sovereign lands Congress has conveyed. The exception does not apply otherwise. Even then it is a narrow exception: Congress must have conveyed the sovereign land "because of 'some international duty or public exigency.' " *Id.* at 552, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). And such a conveyance must not be lightly inferred; Congress's intention to convey the sovereign land must be "definitely declared or otherwise made [very]

plain," "in clear and especial words," or the valid muniment of title must "in terms embrace[ ] the land under the waters * * *." *Id.*, quoting *Holt State Bank, supra*, at 55; *Martin v. Waddell*, 16 Pet. at 411; and *Packer v. Bird*, 137 U.S. 661, 672 (1891). Moreover, the proof must overcome the "strong presumption against conveyance by the United States." *Id.*

The exception is narrow and sets a heavy burden on the State's opponent. And that is proper, for it should be no easy thing to defeat a State's Constitutional entitlement. Indeed, that burden has been met only once, in a case this Court has described as "a singular exception" "based on very peculiar circumstances." *Montana*, 450 U.S. at 555 n. 5, referring to *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

In sum, the State's title can be defeated only if the strong presumption in favor of State title is overcome by proving that: *Congress* has *conveyed* the *sovereign land* to meet some *international duty or public exigency*, and Congress's intention to convey that land was *clearly and definitely expressed*.

The United States claims USGS withdrew the bed of Utah Lake with authority under the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27. It is clear on its face, however, that the Act does nothing to disrupt the State's title.

The Act speaks for itself (or perhaps more aptly, it is dispositively silent), and it does not meet any part of the Constitutional test. The Act authorizes no convey-

ance; does not refer to sovereign lands generally nor to Utah Lake specifically; does not clearly and definitely express any intention to defeat the State's title; and the lakebed had nothing to do with any public exigency.[5]

B. THE WITHDRAWAL OF UTAH LAKE DOES NOT SATISFY THE CONSTITUTIONAL STANDARD.

1. *A State's Equal Footing Title can be Defeated Only by a Congressional Title Conveyance.*

The United States wants to change the venerable Equal Footing Doctrine by adding a new exception that would enable the Utah Lake withdrawal to defeat Utah's title. But the United States' position cannot be justified. Such a new exception would violate basic Constitutional principles underlying the Doctrine.

The Doctrine strictly protects State title except upon proof, under the Constitutional standard, that before statehood the United States conveyed title to a third party,[6] leaving nothing for the State to succeed to. A withdrawal or reservation does not constitute a convey-

[5] Because the Act and the administrative withdrawal undeniably were not tied to an international duty, hereinafter we discuss this branch of the Constitutional test by referring only to "public exigency."

[6] By this we mean to include also any other situation where the United States had no title to which the State could succeed. **E.g.,** Knight v. United Land Ass'n., 142 U.S. 161 (1891) (title under Mexican grants pre-dating territorial acquisition by the United States remains secure as against the state and federal governments). Aside from the **Knight** situation, this Court has found against State title only where there was a pre-statehood title conveyance. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (The United States **conveyed fee title** to the tribe.)

ance or grant, *United States v. Utah*, 283 U.S. 64, 88 (1931), and the United States correctly does not suggest it conveyed title here. Instead, it bases its case solely on the fact of the reservation or withdrawal itself. But under the Constitution, a withdrawal or reservation in itself lacks the power to defeat State title.

Montana illustrates the principle. It involved a federal reservation, but that fact did not help the United States. The dispositive question, along with whether there was a public exigency, was "whether the United States [had] *conveyed*" the sovereign land to the Indian tribe by the two treaties that defined the reservation. 450 U.S. at 550-51 (emphasis added). The Court examined those treaties under the tests composing the Constitutional standard and, finding no conveyance, held for the State. Montana prevailed despite the reservation.

Similarly, in *Choctaw, supra,* where there also was a reservation, it was undisputed that if title were in the United States on Oklahoma's statehood date, it passed "as an incident of statehood." 397 U.S. at 627-28. Besides the public exigency, the only question was whether the pre-statehood treaty had "conveyed title" to the Indians, *id.* at 628; the fact of a reservation itself determined nothing.[7]

[7] The Choctaw Indians prevailed only because of "very peculiar circumstances not present in **[Montana,]**" 450 U.S. at 555 n. 5 (and if not present in **Montana**, then certainly not in the instant case). The **Choctaw** treaty, which followed earlier United States treaty betrayals, "promised to convey new lands • • • in fee simple, and also • • • 'that no part of the land granted to them shall ever be embraced in any Territory or State.' " **Id.,** quoting **Choctaw,** 397 U.S. at 625.

As **Montana** noted, "Neither the special historical origins of the

Montana and *Choctaw*, of course, are not the only cases in which the United States' claim involved an actual or purported withdrawal or reservation. *See e.g., Holt State Bank* and *Pollard's Lessee, supra.* Indeed, so far as we know, every Equal Footing case[8] this Court has decided has involved either an arguable federal title conveyance or some sort of reservation, or both. Yet, in none of those cases could the United States prevail on the mere basis of its reservation. The Court has always looked beyond the reservation to address the Constitutional requirement of a title conveyance. And the United States cannot meaningfully distinguish its situation here so as to avoid that precedent.[9] Unless Constitutional law is dramatically changed in this case, Utah must prevail.

The Doctrine's established exception is justified where the United States' new exception is not. Obviously the Equal Footing Doctrine cannot operate to give a State its entitlement where the sovereign land was validly con-

[7] **Continued**
Choctaw * * * treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from State jurisdiction in those treaties have any counterparts in the terms and circumstances of the [**Montana**]" treaties. 450 U.S. at 555 n. 5. That is a fortiori true of the 1888 Act in the instant case.

[8] That is, every Equal Footing case in which a State's title in sovereign lands was at issue. We do not say, however, that in all those cases the United States so squarely based its claim on the mere fact of a reservation as it does here.

[9] In fact, besides the fact that no conveyance is alleged, the only distinction we see is that here the United States did not purport to reserve or withdraw the bed of Utah Lake for use by any third party, but merely for itself. (In contrast, in some prior cases, **e.g., Montana, Holt State Bank**, and **Choctaw, supra**, the reservation had the purpose of benefiting some third party.) But that distinction only weakens the United States' already-untenable case.

veyed before statehood to a third party. Of course, under the Constitutional standard, the conveyance's validity depends in part on whether it was for a public exigency; but assuming the Constitutional requisites are met, and the United States really does not have title, then there is no title for the State to succeed to. That narrow situation is what the exception covers. *Montana,* 450 U.S. at 551-52.

But the instant case is far different. Here there are no third party rights and the withdrawal did not dispossess the United States of title. A federal reservation or withdrawal "means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another." *United States v. California,* 436 U.S. 32, 40 (1978) (footnote omitted).

Almost by definition a withdrawal or reservation cannot override the Constitutional transfer of title to the State at statehood. It neither extinguishes the United States' title nor abrogates the trust in which the land is held for the future State. "A [federal] reservation * * * cannot operate to escalate the underlying claim of the United States to the land in question."[10] *Id.* at 41.

Of the many cases in which title conveyances were asserted, only one was able to meet the burdens to defeat

[10] In **California**, the Court upheld the State's title to the submerged lands within the Channel Islands National Monument, situated within the three-mile marginal sea. The sentence quoted in the text referred to a national monument reservation, which was held to be no basis for federal title under the Submerged Lands Act, 43 U.S.C. 1313(a). It involved a post-statehood reservation of lands that before the Submerged Lands Act were clearly federal. 436 U.S. at 33-34 and n. 3.

State title. *Choctaw, supra.* And if those other conveyance-related cases were not strong enough, the United States' present case certainly is not strong enough to defeat Utah's title. In light of precedent and Constitutional principles, the withdrawal of Utah Lake looks weak indeed.

If the United States prevails here, it can only be upon a new exception that offends basic Equal Footing principles. It would violate the States' "inherent sovereignty" and nullify the United States' trust obligations; it would permit the trustee to defeat its beneficiary's sovereign title, and take title for itself, by simply reclassifying the lands held in trust; it would reward the trustee for its trust violation; and it would sustain the United States' arrogation of vital rights long held to belong to the States. In short, it would make Utah less equal and less sovereign than other States. The United States seeks to defeat Utah's title in a way the Constitution never envisioned; and, if allowed, it would open the door to further erosion of the Doctrine and less trust responsibility.

But even if Constitutional principles had room for a new exception for withdrawals, *this* withdrawal does not defeat Utah's title. For, assuming a withdrawal could even begin to challenge sovereign title, it would still have to cross every Equal Footing barrier to prevail: The proponent would have to prove the withdrawal was Congressionally authorized, valid, and intended to (and capable of) redressing a public exigency. And Congress's intentions must have focused on the affected sovereign

land, and must have been expressed in clear and definite terms. And the evidence of all of that would have to overcome the strong presumption in favor of State title. If all those barriers were not crossed, the withdrawal could not disturb State title.

The 1889 withdrawal could not meet those heavy burdens. USGS withdrew Utah Lake by purported authority of the 1888 Act. But (as we discuss hereafter) the Act said nothing of Utah Lake—nor of any sovereign land—and withdrawing the Lake could have satisfied no public exigency. Withdrawals are not competent to override sovereign title, and the 1889 withdrawal could not qualify to defeat Utah's title in any event.

2. *The 1888 Act Authorized No Action on Sovereign Lands.*

a. The Act's Terms Show It Applied Only to Public Lands, Not Sovereign Lands.

In *Montana,* the "strong presumption" in favor of State title was shown to relate significantly to the clarity and definiteness test. A court must not infer a conveyance of sovereign lands; Congress's intention to convey must be definitely declared or otherwise made very plain, or stated in clear and especial words. 450 U.S. at 552, 554. The strong presumption cannot be overcome without such an expression.

Nothing in the 1888 Act or other legislation even suggests, much less expresses in clear and definite terms, that Utah Lake or other sovereign lands were to be with-

held from a future State. "There was nothing in this [Act] which even approac[h]es a grant of rights in lands underlying navigable waters; or anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future state." *United States v. Holt State Bank*, 270 U.S. 49, 58-59 (1926).

It would have been "easy [for Congress] to have expressed that intention" to defeat the State's title. *Mann v. Tacoma Land Company*, 153 U.S. 273, 285 (1894). But "[h]aving failed to do so, and omitted any reference to [sovereign] lands," State title cannot be defeated. *Id.* at 285-86. "[N]o unexpressed and unsuggested intention should be attributed to Congress—certainly no intention to make the people of the State * * *, who otherwise would receive these [sovereign] lands for their general benefit, suffer * * *." *Id.* at 286.

Congress, no doubt, was capable of expressing any intention to defeat the future State's title. It did so once before. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). But, instead, the 1888 Act was silent about sovereign lands. One need not seek an exotic explanation for it; the Act did not refer to sovereign lands because Congress did not intend to. There was no reason to change the status of beds of navigable waters.

However, the Tenth Circuit upheld the withdrawal of Utah Lake *because* of the Act's silence (Pet. App. 15a). That is, because the Act did not expressly and affirmatively *exclude* sovereign lands from its scope, the lower court held the State could not own the lakebed.

Id.[11] That construction diametrically opposes the "strong presumption" for State title, which can be overcome only by clear, definite and especial words conveying sovereign lands. Silence does not overcome the presumption.

Under the Tenth Circuit's curious reasoning, a subject not mentioned in the Act was inferred to be within the Act's scope because it was not mentioned. The lower court focused on what was not stated (*i.e.*, expressly excluded), and in effect transformed legislative silence into an affirmative declaration against sovereign lands. But that construction cannot withstand the strong presumption,[12] and should not defeat State title.

The lower court not only misconstrued the Act's silence regarding sovereign lands, but also misapprehended the plain words that are in the Act. And it removed the important distinction between public lands and sovereign lands; a distinction that has been recognized and maintained from the first. *Pollard's Lessee v. Hagan*, 3 How. 212, 221, 223-25 (1845).

Public lands compose the public domain, are owned by the United States and are subject to the public-land laws. "Public lands" are those "subject to sale or other disposal under general laws." *Barker v. Harvey*, 181 U.S.

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[11] The lower court concluded that the Act's silence on sovereign lands meant that "[t]he statute thus imposes no restriction on the U.S.G.S.'s selection authority on the type of lands that could be designated or selected." (Pet. App. 15a.)

[12] Indeed, if the United States' position does anything at all regarding the 1888 Act, it might at most suggest a statutory ambiguity. We dispute that there is any ambiguity at all, but if there were, the strong presumption would require that it be resolved in the State's favor.

481, 490 (1901), quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875). "Specifically, the term 'public lands' [does] not include tidelands [*i.e.*, sovereign lands]." *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935), citing *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894).

On the other hand, sovereign lands are beds of navigable waters. They are owned by the States as a matter of inherent sovereignty and the Equal Footing Doctrine. A State's title in sovereign (submerged) lands "is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892).

The land laws open the public domain to public access for various purposes: the United States may sell its public land outright, or may open it to entry, settlement, occupation, homesteading, or leasing, etc., under various statutory conditions.

On its face the 1888 Act demonstrates that it relates only to the public domain.[13] Its operative terms are strictly public-land-law terms: "all the lands which may hereafter be designated or selected * * * for the sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation * * * are * * * reserved from *sale as the property of the United*

[13] This Court has already acknowledged that the 1888 Act was addressing homesteaders and other settlers on public lands. California v. United States, 438 U.S. 645, 659 (1978).

States, and shall not be subject * * * to *entry, settlement* or *occupation*." The proviso adds that the President might, however, open the lands to *settlement* under the *homestead* laws. 25 Stat. at 527 (emphasis added).

The Act could have been referring only to public lands, not sovereign lands. It was legally and physically impossible to sell, enter, settle, occupy or homestead the water-covered bed of Utah Lake or other sovereign lands. Those things could be done only on public lands.

b. The Act Addressed a Problem Only on the Public Domain.

Moreover, the problem the Act was redressing involved only public lands. "The opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts. Congress addressed this problem in the [1888] Act * * *." *California v. United States*, 438 U.S. 645, 659 (1978).

Congress's concern was not academic. Fraudulent land-grabbers, as well as legitimate settlers and entrymen, had been taking control of key public lands under various land laws.[14]

[14] While the land laws had been passed to facilitate settlement of public lands, they were being abused by speculators. Relevant acts include the General Preemption Act of 1841, the Homestead Act of 1862, the Timber Culture Act of 1873, the Timber and Stone Act of 1878, the Timber Cutting Act, and the Desert Land Act of 1877. They "were commonly used by larger economic interest always glad to appeal to pro-homesteader sentiments to gain their ends." P. Gates, History of Public Land Law Development 638 (1968).

Many of the thousands of public land filings were by speculators and stockmen who had no intention to irrigate the land. Some simply took advantage of the opportunity to graze the lands for three years at 25-cents an acre under the Desert Land Act; others "frequently used dummy entrymen to file for them so they could assemble title to large ranches where only the hay meadows were irrigated and no lands were cultivated." L. Mall, *Public Land and Mining Law* 70 (3rd ed. 1981); and P. Gates, *History of Public Land Law Development* 640 (1968) (hereafter "Gates"). These were "speculative purposes in violation of the restrictions of the law." Gates at 639.

"Thousands of doubtful entries went to patent each year, many of which later were proved to be fraudulent." *Id.* at 641. By 1883, the Commissioner of the Land Office "had had enough of [the] frauds," and advocated the repeal of the timber acts and the Desert Land Act, under which most of the frauds were occurring. *Id.* at 640. His successor and others agreed. *Id.*

Although it did not repeal those laws, "Congress became convinced that the Desert Land Act [and other land laws] needed tightening up, or even suspension, pending further consideration of the best way to aid in reclaiming the arid lands of the West without letting them fall into the hands of 'monopolistic speculators.'" *Id.* at 641. So, Congress passed the 1888 Act, which suspended operation of the land laws as to lands selected as sites for reservoirs and other irrigation works. *Id.*

The 1888 Act arose from a problem on public lands

and pertained only to public lands. See *California v. United States*, 438 U.S. 645, 659 (1978), and Gates at 641. The Act had no purpose as to sovereign lands. That is shown in the Act's legislative history, which makes no reference to sovereign lands but is replete with discussions of public lands and the land laws.[15]

For example, the Appropriations Committee at first would not approve the appropriation for the USGS surveys because the bill then did not prevent people from "following up this geological survey day by day and when a location is found suitable for a reservoir under the general land laws immediately picking it up as a homestead, or under the timber-culture law, or the pre-emption law." 19 Cong. Rec. 7016 (1888). The bill did not preclude "an enterprising American citizen [from] locat[ing] himself * * * in the pathway of [a canal site located by

[15] The following disjunctive examples are but a few of many statements showing that Congress was about to legislate concerning public lands (which could be taken by private entrymen under the land laws) as opposed to sovereign lands (which are not subject to such entry): "I tell you, this is an anti-monopoly measure. This is a measure to preserve this land for the people. This is a measure to prevent the headwaters of these streams from being monopolized by a few * * *." 19 Cong. Rec. 7023 (1888). "[B]ut land which can be covered by water and can be reclaimed * * * should be disposed of with great care, and the legislation should be such as to enable settlers to reclaim it, and also to prevent monopoly." Id. at 7015. "We must know before we legislate further how to dispose of these lands." Id. "[I]f you * * * wait until a plan has been devised by which to dispose of these lands, * * * you will continue to wait, and the places for reservoirs will be picked up, your ditch lines will be obstructed, private rights will have intervened, the land will be taken up by cattlemen and others, * * * until [it finally becomes necessary to] buy[ ] out the places for reservoirs by [condemnation]." Id. "The places for the reservoirs are being taken by private parties, and a person who locates where there ought to be a reservoir knows it very well." Id. at 7016. See also Id. at 7013, 7018, 7019, 7021-7024 and 7026-7031.

the geological survey] so that the * * * United States would be bound sooner or later to pay him a large sum of money for the use of the land which he, under the general land laws, is entitled to take." *Id.*

"The chairman * * * [thought] that when a survey shall be made under this appropriation[,] speculators and schemers will follow along the survey and locate homesteads or otherwise take up tracts * * * which would be selected as places for reservoirs." Senator Jones continued, "I [do not object] to having a clause added that all this land shall be reserved and shall not be subject to be taken up by private individuals until after * * * the location of these works has been fixed by the engineers of the Government." *Id.* at 7018.

So, the concern was that such reservoir sites "upon the public domain" "will fall into the hands of private men," who would monopolize "the use of water and prevent[ ]" settlement. *Id.* at 7019.

That concern yielded amendments to the bill that now appear in the Act as the proviso and the sentence immediately preceding it. Passed with those amendments, the 1888 Act authorized USGS to do two things: survey the arid public lands for suitable irrigation-related sites, and select or withdraw those sites.

The Act suspended operation of the land laws on the withdrawn lands so as to stop the land-grabbers. Otherwise, USGS surveyors would locate suitable sites only to have land-grabbers follow behind and immediately use the land laws to gain ownership or control of those sites.

Beds of navigable lakes did not need the Act's protection because they were never subject to the monopolists or the land laws. *Borax, Ltd., supra,* 296 U.S. at 17. The Act had nothing to do with sovereign lands, and did not authorize the withdrawal of Utah Lake.

Besides exceeding its authority on Utah Lake, USGS also abused what legitimate authority it had under the Act by withdrawing too much public land. Seeing almost everything as a worthy reservoir, ditch, or irrigation site, it withdrew practically "all of the public lands in the West from settlement." *California v. United States,* 438 U.S. 645, 659 (1978). The public outcry was that now USGS, rather than private monopolists, was thwarting settlement. *E.g.,* 21 Cong. Rec. 9155 (1890). As a result, in 1890 Congress repealed the 1888 Act. The 1890 Act and later legislation (see Pet. App. 42a-43a) confirmed that the 1888 Act had authorized the withdrawal of only "public lands."[16]

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[16] The 1890 legislation, 26 Stat. at 391, provided that "so much of [the 1888 Act] as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed * * *."

Further legislation, in 1891, 26 Stat. 1101, supports the 1888 Act's unmistakable pertinence only to public lands. The 1890 act had provided that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided for by said [1888] act * * *." Id. at 391. The 1891 act corrected another aspect of USGS's earlier excesses by providing that the reservoir sites were restricted to "only so much land as is actually necessary for the construction and maintenance of reservoirs * * *." Each of the 1890 and 1891 acts was tied explicitly to the terms of the 1888 Act, and did not purport to expand any authority under that Act. 1897 legislation relating to the use of reservoir sites, 29 Stat. 599, referred to the 1891 act. None of the acts professed, in clear and definite terms or otherwise, to authorize or support the withdrawal of sovereign lands.

The 1888 Act was general legislation about public lands, and "[i]t is settled that the general legislation of Congress in respect to public lands does not extend to [sovereign] lands."[17] *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894). If Congress had wanted to include sovereign lands within the Act's scope, it would have expressed itself in those terms. Congress in fact authorized USGS to do nothing to the bed of Utah Lake.

The Tenth Circuit's contrary conclusion threatens long-standing, basic principles. The decision below treats sovereign lands as though they have the same status as public lands. But that cannot be done without demoting sovereign lands, and such a demotion is wholly unjustifiable.

Assuming Congress could destroy the distinction sovereign lands enjoy over public lands (assuming the Constitution would permit it), Congress certainly did not do it by the language (rather, silence) of the 1888 Act. Only an inverted analysis would conclude that the Act intended to remove the distinction between these two classes of land. If the decision below is not reversed, the legal and practical ramifications in State sovereignty and land administration (not to mention confusion and potential litigation) could be disastrous: Sovereign lands, like public lands, would then be open to public exploitation; the States would lose a significant right of sovereignty; and the Equal Footing Doctrine would be little more than history. The Tenth Circuit should be reversed.

[17] The word in the quotation that we have replaced with "sovereign" was "tide." That substitution does not change the meaning, for tide lands are a type of sovereign land.

C. THERE WAS NO PUBLIC EXIGENCY INVOLVING THE BED OF UTAH LAKE.

The "public exigency" test, like the other components of the Constitutional standard, was not satisfied below. Indeed, the lower courts used a different test.

The district court made no analysis under the public exigency test. The Tenth Circuit acknowledged that fact, but nevertheless was "satisfied that the withdrawal of Utah Lake, including its bed, was made for *a public purpose motivated by a public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled." (Pet. App. 23a (emphasis added), citing the 1888 Act.)

That is not the correct standard. And the State suffered as a result of the lower court's faulty analysis. Suddenly the State's title was being defeated for something less than a public exigency.

The lower court based its new approach on an excerpt from *Shively v. Bowlby*:

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, *or to carry out other public purposes appropriate to the objects for which the United States hold the Territory*.

> But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. [152 U.S. 1, 48 (1894) (emphasis added).]

Most of that language was quoted in *Montana*, 450 U.S. at 551. But unlike the Tenth Circuit, this Court did not give overriding significance to the italicized phrase. In fact, in *Montana* the first word following the *Shively* quotation is "But." 450 U.S. at 552. That suggests that whatever "public purposes appropriate to the objects for which the United States hold the Territory" means, it must yield to the higher standard that was then stated: "But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.' " *Id.*, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935), and *United States v. Holt State Bank*, 270 U.S. at 55. A "public exigency" is undeniably essential. *Montana*, 450 U.S. at 552 and 556.

That was reemphasized when *Montana* explained that "even though the establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby*, justifying a congressional conveyance of a riverbed, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' "; so the State prevailed. 450 U.S. at 556 (citations omitted).

That is proper. Given the gravity of the State interest at stake, title should not be denied except for a real and relevant public exigency.

The lower court's mistake, however, was not only that it failed to apply the public exigency standard. Its analysis was wrong under any standard. The court found its "appropriate public purpose" in the Act's facilitation of irrigation. But irrigation had nothing to do with the lakebed nor with its ownership.

Regardless of who owned the lakebed, it was covered by water, and settlers had long used that water. By the time the 1888 Act was passed, they had been successfully irrigating from the Lake for decades.[18] Irrigation was fair and orderly, and was governed by western water law. There simply was no relevant public exigency to cure, and a federal withdrawal of the lakebed could not have cured anything, anyway.

The land-grabbing that was then occurring on public lands under the land laws also did not present any relevant problem or exigency. For the bed of Utah Lake was not in jeopardy. It physically could not be settled because of the water, and it legally could not be taken into private control because it was sovereign land. So, it was safe from, and independent of, any alleged problem.

"Exigency" denotes an urgent need, and the United States did not need the lakebed (and a fortiori did not

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[18] The Mormons settled the area around Utah Lake in April 1849. "Inventory of the County Archives of Utah, No. 25," Utah County (Provo), Utah Historical Records Survey, p. 11 (Sept. 1940); and irrigation from the Lake has a long history. "Report of Irr. Inv. in Utah," U.S.D.A. Bull. 124, pp. 63-66 (1903).

need title to it) at all. There was no irrigation or settlement problem involving Utah Lake, and certainly no problem that could be solved by withdrawing the lakebed. Since there was no relevant public exigency, Utah owns the bed under the Equal Footing Doctrine.

II. UTAH'S EQUAL FOOTING TITLE IS AS STRONG AS ANY THIS COURT HAS EVER UPHELD.

From *Pollard's Lessee* to the present, the Equal Footing Doctrine has reflected and respected the States' Constitutional ownership of their sovereign lands. This Court has applied the Doctrine in several cases, but only *Choctaw, supra,* met the stringent Constitutional tests to defeat a State's title. We submit that Utah's title in Utah Lake is as good as any this Court has ever had occasion to uphold under the Doctrine. We give a few comparisons.

In the most recent case, *Montana,* the question was whether State title was defeated by two Indian treaties. The first treaty "did not by its terms formally convey any land to the Indians at all." 450 U.S. at 553. So the Court dismissed it and turned to the second treaty. Utah should prevail on that basis alone. For the 1888 Act likewise did not purport to convey any lands, and does not defeat Utah's title.

The second treaty "did expressly convey land to the Crow Tribe." *Id.* It "described the reservation land in detail and stated that such land would be 'set apart for

the absolute and undisturbed use and occupation of the Indians herein named * * *.'" *Id.* (footnote omitted). It provided that the United States "solemnly agrees" that no one but designated government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. *Id.* at 553-54. Nevertheless, the treaty was "not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." *Id.* at 554.

The Court explained: "The treaty in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words,' or 'definitely declared or otherwise made very plain.'" *Id.* (citations omitted to *Packer v. Bird, Martin v. Waddell,* and *United States v. Holt State Bank*). "The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.*

If Montana's title could not be defeated under the second treaty, Utah's title certainly should not be denied under the 1888 Act (nor anything derived from it, *e.g.,* the withdrawal). The treaty conveyed specific land. In contrast, the 1888 Act made no conveyance and contemplated no particular public land out of "the arid region of the United States." In fact, the Act left it to USGS to decide which public lands to withdraw, which further shows that the Act was not intended to encroach on sovereign lands; for it is not reasonable that Congress would think to defeat a State's Constitutional entitlement

by leaving the final decision to administrative action.[19]

The Court in *Montana* further found the riverbed was not needed by the Indians as part of the occupancy of the land being reserved for their use and thus found there to be no public exigency involved. The same is true for Utah Lake—the bed was not necessary to accomplish the purpose of the 1888 Act.

Montana prevailed also despite "the unique legal status of Indian tribes under federal law" that gives Congress a "unique obligation toward the Indians," which often has been the basis for valid legislation giving Indians "special treatment," *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974); and despite this Court's practice of resolving doubts in Indian treaties in favor of the Indians. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). That shows the strength of the presumption in favor of State title.

In this case nothing exists to even challenge that presumption. Here the United States has no special responsibility, like the Indian trust-relationship, that could be claimed to override its Constitutional obligation to hold the lakebed in trust for Utah.

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[19] The tenuity of the decision below is reflected further in its reliance on "documents compris[ing] [USGS's] contemporaneous interpretation and understanding of the scope" of the agency's own action. The court concluded therefrom that USGS actually intended to withdraw the bed of Utah Lake. (Pet. App. 13a). We need not debate USGS's intentions, for they are irrelevant if the agency had no authority. Congress's intent in the 1888 Act is at issue here. The cases the lower court cites, **id.**, (**Choctaw Nation** and **Udall**) do not require deference to an agency's understanding of its own actions where those actions are taken without statutory authority. Since the treaties were insufficient to overcome State title in **Montana**, clearly the administrative documents in this case cannot suffice.

Holt State Bank, supra, also involved an Indian reservation that enveloped a navigable lake whose title was in dispute. 270 U.S. at 52, 57-58. The State prevailed because the reservation did not "operate[ ] as a disposal of lands underlying navigable waters within its limits." *Id.* at 58.

The Court emphasized that the treaties had not made "a grant of rights in" the sovereign lands, *id.* at 58, and that only affirmative language, not silence, can defeat State title.[20] The 1888 Act also did not grant any federal rights in the bed of Utah Lake and was silent about sovereign lands.

In *Pollard's Lessee*, the opponents of State title based their claim on a United States patent and an act of Congress "confirming to them the premises in the patent," 3 How. at 219, 220, and on the legislation enabling Alabama Territory to become a State. *Id.* at 220-221, 223. State title prevailed nevertheless.

In Utah's case there was neither a patent purporting to give title to a third party nor a provision in the Enabling Act that even arguably allowed the United States to own the bed of Utah Lake. In fact, if any inference should be drawn from Utah's Enabling Act, it is that Congress wanted to make sure all of Utah's sovereign rights were secure.[21]

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[20] "There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters." **Holt,** 270 U.S. at 58 (footnote omitted).

[21] The Enabling Act of July 16, 1894, first expressly provided that Utah was "to be admitted into the Union on an equal footing with

The United States prevailed against Utah's title only under the Tenth Circuit's reverse presumption that Utah could not own the lakebed because sovereign lands were not expressly excluded from the Act's scope (Pet. App. 15a), which construction opposes all that *Montana* and its antecedents stand for. *Montana* emphasizes the dominance of the strong presumption for State title, which can be overcome only by a clear and definite expression of Congressional intent to convey the sovereign land to meet a public exigency.

Congress did not defeat the State's title in Utah Lake.[22] The 1888 Act was merely a general act intended to address certain problems on the public domain. It had no reference to, and no effect on, sovereign lands. Nor did any relevant public exigency need the lakebed, and that alone is enough to require a decision in favor of State title. *Montana*, 450 U.S. at 556.

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[21] **Continued**
the original States." 28 Stat. 107. Then it provided that "all Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of [Utah] Territory or by Congress, are hereby repealed." Sec. 20; 28 Stat. 112. Congress never has attempted to defeat Utah's title in sovereign lands; but such an attempt would not have survived the Enabling Act, anyway.

[22] Even assuming the withdrawal had been authorized, it only withdrew the land from public entry and monopolization—not from State ownership at statehood. Assuming the withdrawal were valid at all, at statehood the Equal Footing Doctrine and the Utah Enabling Act superseded it. But even if we indulge the United States' argument further yet, and assume the withdrawal survived Utah's statehood, the withdrawal never purported to do more than reserve a reservoir site. A reservoir site withdrawal is not inconsistent with, and does not defeat, a State's lakebed title and ownership of mineral and other estates.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, by and through its
DIVISION OF STATE LANDS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether title to the bed of Utah Lake (a navigable body of water), which was reserved as a reservoir site by the Sundry Appropriations Act of 1888 and was retained in reservation status by the Sundry Appropriations Act of 1890, subsequently passed to the State of Utah under the equal footing doctrine upon Utah's admission to the Union in 1896.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Summary of argument	7
Argument:	
I. The pre-statehood reservation by the United States of unappropriated public lands underlying a navigable body of water for a particular federal purpose prevents ownership of those lands from passing to a new state under the equal footing doctrine	10
II. The bed of Utah Lake did not pass to the State under the equal footing doctrine because Congress, in the Sundry Appropriations Acts of 1888 and 1890, reserved the bed "as the property of the United States" for use as a reservoir site	20
A. The administrative selection of Utah Lake as a reservoir site specifically included the bed of the Lake	21
B. By virtue of its selection by the Geological Survey as a reservoir site, the bed of Utah Lake was automatically reserved by the 1888 Act	23
1. The reservation under the 1888 Act occurred by operation of law; it was not an administrative withdrawal	23
2. The 1888 Act plainly authorized the selection of the bed of Utah Lake as a reservoir site	25
a. The statutory text	25
b. Background and legislative history	26
c. Contemporaneous administrative construction	27

Argument—Continued: Page

C. Congress ratified the selection of the bed of Utah Lake as a reservoir site in 1890 and retained it in reserved status 29

D. Congress again declined to disturb the reservation of Utah Lake in 1891 and 1897, when it amended the 1888 and 1890 Acts.... 32

E. Petitioner's contention that the background of the 1888 Act supports an implied exclusion of the bed of Utah Lake is without merit 34

III. The reservation of the bed of Utah Lake by the 1888 and 1890 Acts for use as a reservoir site was in furtherance of appropriate public purposes and therefore defeats the State's claim of title under the Equal Footing Doctrine.. 44

Conclusion 51

Appendix A 1a

Appendix B 3a

TABLE OF AUTHORITIES

Cases:

Alabama v. *Texas*, 347 U.S. 272 (1954) 44
Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 (1918) 16, 38, 47
Aluminum Co. of America v. *Central Lincoln People's Utility District*, 467 U.S. 380 (1984).... 27
Andrus v. *Utah*, 446 U.S. 500 (1980) 19
Appelby v. *City of New York*, 271 U.S. 364 (1926) 46
Barber v. *Harvey*, 181 U.S. 481 (1901) 36
Block v. *North Dakota*, 461 U.S. 273 (1983)..4, 14, 37, 48
Blodgett v. *Holden*, 275 U.S. 142 (1927) 44
Borax, Ltd. v. *Los Angeles*, 296 U.S. 10 (1935).... 36
Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U.S. 77 (1922) 12, 45, 46

Cases—Continued: Page

California v. *United States*, 438 U.S. 645 (1978).. 27, 31, 33, 34, 40
CFTC v. *Schor*, No. 85-621 (July 7, 1986) 27, 32
Choctaw Nation v. *Oklahoma*, 397 U.S. 620 (1970) 12, 16, 36, 37, 45, 46
Colomokas Gold Mining Co., 28 Pub. Lands Dec. 172 (1899) 31
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 26
Coyle v. *Smith*, 221 U.S. 559 (1911) 10
Escondido Mutual Water Co. v. *LaJolla Band of Mission Indians*, 466 U.S. 765 (1984) 26
FDIC v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986) 31
Goodtitle v. *Kibbe*, 50 U.S. (9 How.) 471 (1850).. 12
Hawaii Housing Authority v. *Midkiff*, 467 U.S. 229 (1984) 48
Hynes v. *Grimes Packing Co.*, 337 U.S. 116 (1949) 36, 38
Ide v. *United States*, 263 U.S. 497 ..... 31, 42
Illinois Central R.R. v. *Illinois*, 146 U.S. 387 (1892) 11, 38, 46
Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, 460 U.S. 150 (1983) 37
John Gabthuler, 15 Pub. Lands Dec. 416 (1892).... 31
Kleppe v. *New Mexico*, 426 U.S. 529 (1976)..... 18, 45
Kohl v. *United States*, 91 U.S. 367 (1875) 14
Light v. *United States*, 220 U.S. 523 (1911)..... 45
Mann v. *Tacoma Land Co.*, 153 U.S. 273 (1894).. 36
Marsh v. *Utah*, 740 F.2d 799 (10th Cir. 1984).... 40
Martin v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842).. 11, 23
Massachusetts v. *Mellon*, 262 U.S. 447 (1923)..... 18
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 10, 49, 50
Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 31
Miller v. *Youakim*, 440 U.S. 125 (1979) 29
Missouri v. *Holland*, 252 U.S. 416 (1920) 18
Montana v. *United States*, 450 U.S. 544 (1981)....*passim*
Nevada v. *United States*, 463 U.S. 110 (1983).... 13
Newhall v. *Sanger*, 92 U.S. 761 (1875) 36

Cases—Continued: Page

North Haven Board of Education v. *Bell*, 456 U.S. 512 (1982) 27
Packer v. *Bird*, 137 U.S. 661 (1891) 5, 23
Pollard's Lessee v. *Hagan*, 44 U.S. (3 How.) 212 (1845) 11, 12, 15
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 32
Shivley v. *Bowlby*, 152 U.S. 1 (1894) ..... *passim*
Stearns v. *Minnesota*, 179 U.S. 223 (1900) 10
Summa Corp. v. *California ex rel. Lands Comm'n*, 466 U.S. 198 (1984) 13
Udall v. *Tallman*, 380 U.S. 1 (1965) 19, 27
United States v. *Alaska*, 423 F.2d 764 (9th Cir.), cert. denied, 400 U.S. 967 (1970) 9, 19, 43
United States v. *American Trucking Ass'n*, 310 U.S. 534 (1940) 29
United States v. *California*, 436 U.S. 32 (1978) 20
United States v. *Anchorage*, 437 F.2d 1081 (9th Cir. 1971) 6, 19-20
United States v. *Dann*, 470 U.S. 39 (1985) 15
United States v. *50 Acres of Land*, 469 U.S. 24 (1984) 14
United States v. *Fitzgerald*, 40 U.S. (15 Pet.) 407 (1841) 15
United States v. *Gettysburg Electric Ry.*, 160 U.S. 668 (1896) 48
United States v. *Gratiot*, 39 U.S. (14 Pet.) 526 (1840) 44
United States v. *Holt State Bank*, 270 U.S. 49 (1926) 5, 17, 46
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915) 44
United States v. *Morrison*, 240 U.S. 192 (1916) 15
United States v. *Mottaz*, No. 85-546 (June 11, 1986) 4
United States v. *Oregon*, 296 U.S. 1 (1935) 11, 18
United States v. *Price*, 383 U.S. 787 (1966) 27
United States v. *San Francisco*, 310 U.S. 16 (1940) 45
United States v. *State of Alaska*, 423 F.2d 764 (9th Cir.), cert. denied, 400 U.S. 967 (1970) 6, 19, 43

Cases—Continued: Page

United States v. *Texas*, 339 U.S. 707 (1950) 10
United States v. *Virginia Electric Co.*, 365 U.S. 624 (1961) 39
United States v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) 37
United States v. *Wyoming*, 331 U.S. 440 (1947) 19
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 18, 45
W.D. Harrigan, 29 Pub. Lands Dec. 153 (1899) 31
Walters v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985) 44
Western & Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648 (1981) 48-49
Wilcox v. *Jackson*, 38 U.S. 498 (1839) 15

Constitution and statutes:

U.S. Const.:
Art. I 13, 15
§ 8, Cl. 18 (Necessary and Proper Clause) 14, 49
Art. IV, § 3, Cl. 2 (Property Clause) 7, 13, 15, 16, 44, 46
Art. VI, Cl. 2 (Supremacy Clause) 16, 19
Amend. V 9, 48
Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 *et seq.* 32
§ 1, 26 Stat. 1095 33
§ 2, 26 Stat. 1096 33
§ 4, 26 Stat. 1097 33
§§ 18-21, 26 Stat. 1101-1102 33
Act of Feb. 28, 1891, ch. 384, 26 Stat. 196 15
Act of Feb. 26, 1897, ch. 535, 29 Stat. 599, 43 U.S.C. 665 ..... 33, 34
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a) 90 Stat. 2792 ..... 1a
Jt. Res. No. 7, 25 Stat. 618 28
Quiet Title Act:
28 U.S.C. 1346(f) 4
28 U.S.C. 2409a 4
28 U.S.C. 2409a(f) 4

Constitution and statutes—Continued: Page

Reclamation Act of 1902, 32 Stat. 388 *et seq.* 40
Submerged Lands Act of 1953, 43 U.S.C. 1301-1303 ..... 2, 20
Sundry Appropriations Act of 1888, ch. 1069, 25 Stat. 505 *et seq.* 1, 2, 1a
25 Stat. 526 ..... *passim*
25 Stat. 527 ..... *passim*
Sundry Appropriations Act of Aug. 30, 1890, ch. 837, 26 Stat. 371 *et seq.* 1, 2, 2a
26 Stat. 391 ..... *passim*
Utah Enabling Act, ch. 138, 28 Stat. 107 *et seq.*:
§ 6, 28 Stat. 109 ..... 18, 19, 43
§ 20, 28 Stat. 112 42
16 U.S.C. 3102(1) 36
16 U.S.C. 3102(2) 36
16 U.S.C. 3102(3) 36
43 U.S.C. 1702(e) 36

Miscellaneous:

19 Cong. Rec. (1888):
p. 1766 28
pp. 2428-2429 28
pp. 7012-7032 24
pp. 7017-7018 41
p. 7020 41
p. 7027 41
pp. 7031-7032 24
p. 7360 24
pp. 7681-7682 24
pp. 7964-7965 24
p. 8200 24
pp. 8200-8202 24
p. 8202 24
p. 8400 24
p. 8461 41
p. 8462 29
p. 8471 41
pp. 8471-8473 41
pp. 8474-8475 41

Miscellaneous—Continued: Page

p. 8476 41
p. 8505 24
p. 8507 24
p. 8510 41
p. 8535 24
pp. 8542-8543 24
p. 8809 24
pp. 8898-8899 24
p. 8980 24
p. 9012 24
21 Cong. Rec. (1889):
p. 27 29
p. 29 29
21 Cong. Rec. (1890):
p. 6048 32
pp. 6045-6059 30
p. 6050 32
p. 6052 32
p. 6053 32
p. 6054 32
p. 6055 32
p. 7087 29
pp. 7269-7291 30
pp. 7319-7333 30
pp. 7341-7361 30
pp. 7393-7417 30
pp. 7722-7729 30
pp. 7765-7782 30
p. 7780 31
pp. 7875-7879 30
pp. 7928-7936 30
pp. 7978-7989 30
pp. 8275-8280 30
pp. 8323-8332 30
pp. 8426-8427 30
pp. 9137-9140 30
pp. 9145-9157 30
p. 9150 25
p. 9156 25

Miscellaneous—Continued:	Page
29 Cong. Rec. (1897):	
p. 1847	34
p. 1948	33
p. 1950	34
p. 1952	34
P. Gates, *History of Public Land Law Development* (1968)	28, 31, 33, 34, 40
1 C. Kinney, *Law of Irrigation* (2d ed. 1912)	15
IX Murray's *New English Dictionary* (1897)	49
19 Op. Att'y Gen. (1890):	
p. 564	25
p. 566	25
IX *Oxford English Dictionary* (1933 ed.)	21
Report on the Lands of the Arid Region of the United States, with a More Detailed Account of the Lands of Utah, H.R. Exec. Doc. 73, 45th Cong., 2d Sess. (1878)	28
S. Exec. Doc. 199, 51st Cong., 1st Sess. (1890)	30
S. Rep. 928, 51st Cong., 1st Sess. (1890)	30, 38, 39
United States Geological Survey, Tenth Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 1st Sess. (1890)	3, 21, 28, 29
United States Geological Survey, Eleventh Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 2d Sess. (1890)	4, 22, 29, 30, 39
United States Geological Survey, Eleventh Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 52d Cong., 1st Sess. (1892)	4, 22, 39, 3a
Webster's Third New International Dictionary (1976)	21

In the Supreme Court of the United States

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No. 85-1772

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 780 F.2d 1515. The opinion of the district court (Pet. App. 28a-41a) is reported at 624 F.Supp. 622.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985 (J.A. 41). On March 12, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 25, 1986, and the petition was filed on April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505 *et seq.*, and the Sundry Appropriations Act of August 30, 1890, ch. 837, 26 Stat. 371 *et seq.*, are reproduced in relevant part at App., *infra*, 1a-2a.

STATEMENT

This case concerns the ownership of the bed of Utah Lake, a freshwater lake in Utah County that is drained by the Jordan River, which flows northward and empties into the Great Salt Lake. The parties have stipulated that Utah Lake was navigable on January 4, 1896, the date on which Utah was admitted to the Union (J.A. 12; Pet. App. 8a n.4). Under the equal footing doctrine, lands beneath navigable waters in territories acquired by the United States ordinarily pass to the new States that are created out of those territories. However, in some situations, action by the United States with respect to the bed prior to statehood may have the effect of defeating the new State's claim. In this case, both courts below held that Utah did not obtain title to the bed of Utah Lake upon its admission to the Union in 1896 because the United States had reserved the lands underlying the Lake as a reservoir site in 1888.[1]

The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505 *et seq.* (the "1888 Act"[2]) authorized the United States Geological Survey to select "sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows" (25 Stat. 526). The 1888 Act further provided that "all the lands which may hereafter be designated or selected * * * for sites for reservoirs * * * are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law" (25 Stat. 527).

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[1] Petitioner also contended in the courts below that it obtained title to the bed of Utah Lake under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1303. That claim was rejected by the courts below (Pet. App. 24a-26a, 40a-41a), and petitioner does not renew it here.

[2] As used herein, the terms "1888 Act" and "1890 Act" (see page 4, *infra*) refer to only the relevant paragraph of each Act.

On April 6, 1889, Major John Wesley Powell, the Director of the Geological Survey, submitted a report to the Secretary of the Interior "[i]n conformity with the act approved October 2, 1888" (Dfdts' Mot. for Sum. Jdgmt., Exh. A (J.A. 19)). Major Powell stated that the "site of Utah Lake in the Territory of Utah is hereby selected as a reservoir site, together with all lands situate within two statute miles of the border of said lake at high water" (*ibid*). He recommended that pending a more accurate designation, the Land Office at Salt Lake City should be instructed to refuse further entries of public lands within the described limits, because such entries would tend to "obstruct the use of the lake as a natural reservoir for the irrigation of lands below its outlet" (*ibid.* (J.A. 20)). On April 11, 1889, the Commissioner of the General Land Office informed the Salt Lake City Office of Major Powell's selection of "the site of Utah Lake" as "a reservoir site" and instructed that Office "to refuse further entries or filing on the lands designated, in accordance with the Act of October 2, 1888" (*id.* Exh. B (J.A. 21)). On April 13, 1889, the Secretary of the Interior informed Major Powell that he had received the latter's notification regarding Utah Lake and that the requested instructions had been issued to the Land Office (*id.* Exh. C (J.A. 22)).

The selection of Utah Lake thereafter was confirmed in the official reports of the Geological Survey, which were formally transmitted to Congress. The Tenth Annual Report, for the fiscal year ending June 30, 1889, stated that Utah Lake had been examined "with reference to its capacity for a reservoir site" and that the Geological Survey had determined "the specifications for its withdrawal as such under the law, so far as the *lands covered or overflowed by it* or the lands bordering upon it were still public lands" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5) 51st Cong., 1st Sess. 88 (1890) (J.A. 25) (emphasis added)). The Report also listed "Utah Lake" in a table of "Reservoir Sites Selected" (*id.* at 63 (J.A. 24)). The Eleventh Annual Report, for fiscal year 1890, stated that a "careful survey" had since been made of Utah Lake and that the "segregation" of lands for the reservoir was

made to include "*not only the bed but the lowlands up to mean high water*" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 2d Sess. 183-184 (1890) (J.A. 28-29) (emphasis added)). Similarly, the Twelfth Annual Report stated that there had been a "segregation of the land around and under the lake" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 52d Cong., 1st Sess. 339 (1892) (Pet App. 13a)).

After the Geological Survey informed Congress of the selection of the bed of Utah Lake, Congress, in the Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371 *et seq.* (the "1890 Act"), repealed the 1888 Act. However, the 1890 Act contained a savings clause, which provided "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888] act, until otherwise provided by law" (26 Stat. 391). In the years since 1890, Congress has not "otherwise provided by law" for a disposition of the lands underlying Utah Lake.

2. In 1976, the Department of the Interior issued oil and gas leases for certain of the lands underlying Utah Lake (Pet. App. 2a). Petitioner subsequently commenced this suit on May 22, 1979, in the United States District Court for the District of Utah against the United States, the Secretary of the Interior, and other officials of the Interior Department (J.A. 1, 4-7). Petitioner sought a declaratory judgment that it, rather than the United States, had title to the lake bed, and an injunction against interference with its alleged ownership and management rights (J.A. 6-7; Pet. App. 3a, 28a-29a).[3] The district

[3] The district court held that it had jurisdiction over this suit under 28 U.S.C. 1331 and the Quiet Title Act, 28 U.S.C. 1346(f) and 2409a (Pet. App. 31a-32a, 36a). However, the court of appeals, relying on *Block* v. *North Dakota*, 461 U.S. 273 (1983), held that the Quiet Title Act provided the sole basis for jurisdiction (Pet. App. 4a n.2). See also *United States* v. *Mottaz*, No. 85-546 (June 11, 1986), slip op. 6-7, 12-13.

In district court, respondents contended that petitioner's suit was barred by the 12-year limitations period prescribed by 28 U.S.C. 2409a(f) for suits under the Quiet Title Act (J.A. 8, 14). The district court rejected that contention, finding that, despite

court granted summary judgment for respondents, holding that title to the bed of Utah Lake is in the United States (Pet. App. 28a-41a). The court found that "[t]he language used in the correspondence and documents surrounding the 1889 withdrawal expressly include the bed of Utah Lake" (*id.* at 36a-38a). As a result of that prior reservation, the court held that petitioner did not acquire title to the bed under the equal footing doctrine upon admission to the Union in 1896 (*id.* at 36a-40a).

3. A unanimous panel of the court of appeals affirmed (Pet. App. 1a-27a). The court first summarized the principles reiterated by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), concerning state claims to lands underlying navigable waters. The court recognized the general rule that lands under navigable waters pass to the States "when they enter the Union and assume sovereignty on an 'equal footing' with the established States" (Pet. App. 6a, quoting 450 U.S. at 551). But the court further recognized that "'Congress may sometimes convey lands below the high-water mark of a navigable water, "[and so defeat the title of a new State], in order to * * * carry out * * * public purposes appropriate to the objects for which the United States hold the Territory"'" (Pet. App. 7a, quoting 450 U.S. at 551, and *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894)). Finally, the court noted that the United States is presumed not to have made a pre-statehood conveyance of such lands and that a conveyance will be found only if the intention is "'"made plain"'" (*id.* at 7a-8a, quoting 450 U.S. at 552, and *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)) or "'in terms embraces the land under the waters'" (Pet. App. 8a, quoting 450 U.S. at 552, and *Packer* v. *Bird*, 137 U.S. 661, 672 (1891)).

correspondence between the Secretary of the Interior and the Governor of Utah in 1963 and a Regional Solicitor's opinion in 1965, the evidence did not establish that petitioner knew or should have known of the United States' claim (Pet. App. 32a-36a). Respondents did not challenge that holding in the court of appeals (Pet. App. 4a n.2).

Although this Court in *Montana* discussed the foregoing principles in the context of an alleged pre-statehood conveyance by the United States to a third party, the court of appeals agreed with the Ninth Circuit that "the same principles also apply to pre-statehood reservations or withdrawals by the United States" (Pet. App. 8a, citing *United States* v. *City of Anchorage*, 437 F.2d 1081, 1084-1085 (9th Cir. 1971), and *United States* v. *Alaska*, 423 F.2d 764, 766-768 (9th Cir.), cert. denied, 400 U.S. 967 (1970)). Applying these principles, the court held that petitioner's claim was defeated by the United States' reservation of the bed as a reservoir site in 1888 (Pet. App. 9a-24a).

The court of appeals first agreed with the district court that the language of Major Powell's selection and the annual reports of the Geological Survey "reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection" (Pet. App. 13; see *id.* at 9a-13a). The court then rejected petitioner's contention that even if the 1889 selection included the lake bed, the 1888 Act did not authorize that selection (*id.* at 13a-21a). The court reasoned that: (i) the 1888 Act authorized the withdrawal of "all the lands" designated as reservoir sites, not merely dry lands above the water line (*id.* at 14a-15a); (ii) Congress expressly preserved existing withdrawals of reservation sites when it passed the 1890 Act (*id.* at 15a-16a); (iii) further statutory amendments in 1891 and 1897 likewise did not modify the reservation of the lands underlying Utah Lake (*id.* at 16a-17a); and (iv) the general statements in the legislative history relied upon by petitioner did not overcome the plain language and contemporaneous interpretation of the 1888 Act and failed to establish that the purposes of the 1888 Act were inapplicable to land underlying navigable lakes (*id.* at 17a-21a).

The court of appeals also rejected petitioner's contention that even if authorized by the 1888 Act, the reservation of the bed of Utah Lake as a reservoir site did not defeat the State's claim because the reservation was

not in response to some "'public exigency'" (Pet. App. 21a, quoting *Montana*, 450 U.S. at 556). The court noted that Congress may dispose of lands underlying navigable waters in a territory, with the consequence of defeating a new State's title, in order to carry out "'public purposes appropriate to the objects for which the United States hold the Territory'" (Pet. App. 22a, quoting *Montana*, 450 U.S. at 551, and *Shively*, 152 U.S. at 48). In the court's view, the selection in this case was valid, because "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by a public exigency, given Congress's stated concerns [in the 1888 Act] that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a).

SUMMARY OF ARGUMENT

I. Under the equal footing doctrine, unappropriated lands underlying navigable waters in a territory of the United States ordinarily pass to the new State upon its admission to the Union. However, because Congress has complete ownership of and sovereignty over such lands, Congress may convey them prior to statehood and thereby defeat the new State's claim. A pre-statehood reservation of a lake or river bed by the United States, to be devoted to a special federal purpose, has the same effect on the new State's claim. Congress acts in two capacities in providing for such a reservation: it "*dispose*[*s*] of * * * the Territory [or] other Property belonging to the United States" in the public domain (Art. IV, § 3, Cl. 2), and it *acquires* property to be used in programs authorized pursuant to Congress's powers under that Clause and Article I. Because the United States therefore effectively conveys the property to itself, such a transaction is the same for purposes of the equal footing doctrine as a conveyance to a third party, which concededly defeats the new State's claim.

The purposes underlying the equal footing doctrine do not suggest that the United States is constitutionally foreclosed from reserving the unappropriated beds of

navigable waters as the property of the United States. To the contrary, such a reservation retains the property in sovereign ownership and control. Congress can thereby protect the public interest in navigation, fishing and other uses of the overlying waters and even permit the bed to pass to the State in the future if circumstances warrant. This special status of reserved lands also is reflected in the Utah Enabling Act, which provides that lands in federal reservations are not among those granted to the State for school purposes upon its admission to the Union. The decisions of this Court and the courts of appeals further support the conclusion that reserved lands do not pass to the State under the equal footing doctrine.

II. The bed of Utah Lake was reserved by statute for reservoir purposes in 1888, and it therefore did not pass to Utah upon its admission to the Union in 1896. The Sundry Appropriations Act of 1888 authorized the Geological Survey to select reservoir sites on federal lands and provided that those sites were "hereby henceforth reserved" as "the property of the United States." 25 Stat. 526-527. The record clearly establishes, and both courts below found, that the Geological Survey selected the bed of Utah Lake as a reservoir site in 1889, which automatically triggered its reservation under the 1888 Act. Moreover, the Geological Survey formally reported that selection to Congress, which then ratified it by providing in the Sundry Appropriation Act of 1890 that all reservoir sites that had been selected were to remain reserved "until otherwise provided by law." 26 Stat. 691. Congress again declined to disturb that reservation when it amended the 1888 Act in 1891 and 1897, and it has not "otherwise provided" for a disposition of the lands underlying Utah Lake since that time. Those lands therefore remain part of a federal reservation.

Contrary to petitioner's contention, the Geological Survey's selection of Utah Lake was clearly authorized by statute. The 1888 Act broadly provided for the selection of reservoir sites throughout the "arid region" and for the reservation of "all the lands" so selected; there was no exception for any lands that happened to underlie

navigable waters. Moreover, the selection of Utah Lake was approved by Major John Wesley Powell, the Director of the Geological Survey, who drafted the statutory language authorizing the selection of reservoir sites and was intimately familiar with irrigation in the arid region. The purposes of the 1888 Act also support its application here. The Act's purpose of protecting against speculation in and monopolization of lands needed for irrigation projects was applicable, because it was anticipated that the level of the Lake would be lowered, which would have exposed some of its bed to settlement. But the Act was further intended to freeze *all* reservoir sites in federal ownership, in order to preserve Congress's options for developing them in the future. The absence of a specific mention of the beds of navigable lakes in the legislative history does not suggest that they were implicitly excluded from coverage. Because the beds were not to be granted to private parties and because the navigability of overlying waters would have no bearing on the suitability of a reservoir site, Congress had no occasion to consider treating such lands differently.

III. Contrary to petitioner's contention, this Court's decisions do not suggest that Congress's constitutional authority to dispose of the bed of a navigable body of water is limited to situations of "public exigency." To the contrary, the Court repeatedly has said that Congress may make such a disposition "whenever" necessary to further "public purposes appropriate to the objects for which the United States hold the territory." *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). The term "public exigency" is used in the cases only to describe the circumstances in which Congress, as a matter of policy, has provided for grants of submerged lands to private parties, and therefore only as a guide to congressional intent. An "appropriate public purpose" for the reservation of federally owned lands is the same as a "public use" that, under the Fifth Amendment, would justify the United States' acquisition of the same property by condemnation. The reservation of the bed of Utah Lake as a reservoir site clearly was for a proper "public use" and "public purpose," and in-

deed petitioner does not argue otherwise. Moreover, even a test of "public exigency" would require only that the disposition be "necessary," which under *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), likewise connotes "appropriate." In any event, the urgent circumstances confronting Congress in 1888 would satisfy a more stringent standard of "public exigency" as well.

ARGUMENT

I. THE PRE-STATEHOOD RESERVATION BY THE UNITED STATES OF UNAPPROPRIATED LANDS UNDERLYING A NAVIGABLE BODY OF WATER FOR A PARTICULAR FEDERAL PURPOSE PREVENTS OWNERSHIP OF THOSE LANDS FROM PASSING TO A NEW STATE UNDER THE EQUAL FOOTING DOCTRINE

States admitted to the Union after adoption of the Constitution are deemed to be on an "equal footing" with the original thirteen States. The core of this principle of equality pertains to the political participation by each State within the framework of the Federal Constitution and to the sovereignty of each over its own internal affairs. *Stearns* v. *Minnesota*, 179 U.S. 223, 244-245 (1900); *Coyle* v. *Smith*, 221 U.S. 559 (1911); *United States* v. *Texas*, 339 U.S. 707, 716 (1950). In at least one context, however, the equal footing of the States also has a proprietary aspect: newly admitted States in general are held to have the same rights as the original thirteen States to the lands underlying navigable waters within their borders. But where, as here, the United States validly appropriates certain lands underlying navigable waters to a distinct and paramount federal purpose while the region is still a territory, those lands are thereby removed from the corpus of unappropriated submerged lands that pass to the State under the equal footing doctrine upon admission to the Union. As the nature and origins of the equal footing doctrine make clear, the State's claim in such a case cannot override the United States' prior and paramount rights that were acquired in the public interest of the Nation as a whole at a time

when the United States had ownership of and plenary control over the disposition of those territorial lands.

A. When the region comprising the original thirteen States was first settled, "the title and the dominion of the tide waters and the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each State for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Shively*, 152 U.S. at 49, quoting *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 409-411 (1842). But the origins and rationale of the State's ownership of the bed are not strictly proprietary; rather, the State is often described as holding the lands in "trust," in order to assure the enjoyment of certain public rights and the furthering of public purposes, such as fishing and the promotion of navigation. *Ibid.*; see generally *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452-458 (1892). It is for this reason that the ownership of lands underlying navigable waters is viewed as "an incident of sovereignty" (*Montana* v. *United States*, 450 U.S. 544, 551 (1981)) and that "a presumption against their separation from sovereignty must be indulged" (*United States* v. *Oregon*, 295 U.S. 1, 14 (1935)).

When the United States acquires territory, it also acquires the same title and dominion over lands underlying navigable waters as are possessed by the States. Those submerged lands thereafter "are held by the United States for the benefit of the whole people, and, as this court has often said, * * * 'in trust for the future States' " (*Shively*, 152 U.S. at 49, quoting *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 222 (1845)), "to be granted to [the] States when they enter the Union and assume sovereignty on an 'equal footing' with the established States" (*Montana*, 450 U.S. at 551).

Language in *Pollard's Lessee* further suggested that the United States lacked the *power* to grant any land below the high water mark of navigable waters in a ter-

ritory of the United States. But as the Court observed more than 90 years ago with respect to those dicta, "it is evident that this is not strictly true." *Shively*, 152 U.S. at 47; see also *id.* at 28. Indeed, only several years after *Pollard's Lessee* was decided, the Court had stated with respect to lands underlying navigable waters in Alabama that "[u]ndoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State." *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 471, 478 (1850). See also *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85 (1922); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 645-647 (1970) (White, J., dissenting). Thus, in *Shively*, after a thorough survey of the precedents since the earliest days of the Nation, the Court concluded (152 U.S. at 48 (citations omitted; emphasis added)):

> By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the *entire* dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.
>
> We cannot doubt, therefore, that *Congress has the power to make grants of lands below the high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so* in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or *to carry out* other *public purposes appropriate to the objects for which the United States hold the Territory.*

The Court has adhered to these principles ever since. In *Choctaw Nation*, the Court, citing *Shively*, found it to be "well settled that the United States can dispose of lands underlying navigable waters [prior to statehood,] just as it can dispose of other public lands" (397 U.S. at 633). Similarly, in *Montana*, the Court regarded it as "established * * * that Congress may sometimes convey lands

below the high-water mark of a navigable water," and "so defeat the title of a new State" (450 U.S. at 551). See also *Summa Corp.* v. *California ex rel. Lands Comm'n*, 466 U.S. 198, 206 n.4 (1984).

As is evident, although the Court's decisions use the word "trust" to describe the relation of the United States to the lands underlying the navigable waters in a territory of the United States, the United States has no constitutional obligation to retain such lands perpetually unencumbered because of the possibility that a new State might be created out of the territory at some time in the future. Congress cannot be disabled during the territorial period from performing the sovereign responsibilities of the United States Government, pursuant to its enumerated powers conferred by Article I as regards the role of the National Government and its distinct and plenary "Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States" (Art. IV, § 3, Cl. 2).

Accordingly, when considering the appropriate use or disposition of lands underlying navigable waters during the territorial period, Congress has full authority to consider the interests of and to act on behalf of the people in the Nation as a whole, as well as the people of the territory. This follows from Congress's "entire dominion and sovereignty, national *and* municipal, Federal *and* state, over all the Territories" (*Shively*, 152 U.S. at 48 (emphasis added)). In fact the Court in *Shively* made clear that the United States holds the lands underlying navigable waters in the territories not only "in trust for the future States," but also "for the benefit of the *whole people*" (152 U.S. at 49, 58 (emphasis added)). For this reason, Congress does not violate a "trust" obligation to a future State and its citizens if, in the interests of the Nation as a whole, it makes an appropriate disposition of the bed of a navigable body of water while the region remains a territory. Cf. *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983).

B. Petitioner contends, however, that a State's claim to the bed of a navigable body of water may be defeated

only by a grant or other conveyance of the land by the United States to a third party prior to statehood. In petitioner's view, a State's claim of title must prevail over that of the United States under *all* circumstances in which the United States retains title to the land at the time the State is admitted to the Union—even where, as here, Congress explicitly withdrew the bed from the unappropriated lands prior to statehood and reserved it as the property of the United States to be devoted to a distinct and paramount federal purpose. This argument cannot be squared with the supremacy of the laws and actions of the United States in the areas of its constitutional responsibilities.

1. Congress has the unquestioned power to acquire property in aid of the other powers conferred on it by the Constitution, whether the property is situated in a State or territory. *Kohl* v. *United States*, 91 U.S. 367 (1875); Art. I, § 8, Cl. 18 (Necessary and Proper Clause). The property of a State—including land underlying a navigable body of water—may be acquired by the United States in the same manner as that of a private person, either by purchase or by the exercise of the power of eminent domain, with the payment of compensation. See *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983); see also *United States* v. *50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984).

However, when submerged lands are still within a territory, there is no need for the United States to pay compensation in order to appropriate them, because the United States already is the owner. This is so whether the United States appropriates the lands for governmental purposes relating specifically to the territory (such as for municipal improvements), to the broader interests of the Nation as a whole (such as for a military, National Park, National Forest, or Indian Reservation), or to a combination of the two (such as for an irrigation project). Moreover, because the United States not only owns the property but exercises complete dominion over it, there is no need for the United States to condemn the property in order to acquire it. Congress may simply provide for the submerged lands, like any other federal lands, to be appropriated or reserved to the special federal purpose, either directly by statute or by the authorized actions of an Executive official. Such a reservation or appropriation, like a conveyance of that land to a third party, is a "disposition" of the property within the meaning of Art. IV, § 3, Cl. 2 of the Constitution. See *United States* v. *Morrison*, 240 U.S. 192, 212 (1916); *United States* v. *Fitzgerald*, 40 U.S. (15 Pet.) 407, 420-421 (1841); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 511-514 (1839)[4]; 1 C. Kinney, *Law of Irrigation* § 414, at 698-700 (2d ed. 1912); Act of Feb. 28, 1891, ch. 384, 26 Stat. 796.

Accordingly, when Congress authorizes or directs the reservation of unappropriated lands, it exercises not only its constitutional authority to acquire property in aid of the responsibilities of the Federal Government, but also its "Power to dispose of * * * the Terrtiory or other property belonging to the United States" (Art. IV, § 3, Cl. 2). In other words, the United States acts in two roles, effectively conveying land it holds in one capacity and acquiring it to be used in another. Compare *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). The United States thereby transforms its relation to the land from that of the residual holder of the public domain to that of the owner of the property in a more distinct and sovereign sense, in furtherance of Congress's enumerated powers under Article I as well as the Property Clause.

2. Nothing in this Court's decisions discussing the equal footing doctrine suggests that the United States is uniquely disabled from reserving or otherwise acquiring certain unappropriated federal lands for its special use in this manner merely because those lands happen to lie beneath navigable waters in a territory of the United States. To the contrary, in *Pollard's Lessee* it-

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[4] See 38 U.S. (18 Pet.) at 513.

"[W]hensoever a tract of land shall have once been legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and * * * no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

self, the Court stated that upon its admission to the Union, a State succeeds to "the navigable waters, and soils under them * * *, *subject to the rights surrendered by the Constitution to the United States*" (44 U.S. (3 How.) at 229 (emphasis added)). One of the rights surrendered to the United States is that of *disposing* of the territory and other property of the United States, including by appropriation or reservation. Another is the right of *acquiring* property—even from a State after its admission to the Union, and, a fortiori, from the unappropriated "Property belonging to the United States" (Art. IV, § 3, Cl. 2) prior to statehood. Under the Supremacy Clause (Art. VI, Cl. 2), the exercise of those powers defeats the State's claim of title.

In addition, under the Court's equal footing decisions, it is "well settled that the United States can dispose of lands underlying navigable waters *just as it can dispose of other public lands.*" *Choctaw Nation*, 397 U.S. at 633 (emphasis added). The Court held in *Choctaw Nation* that Oklahoma did not receive title upon statehood to a segment of the bed of the Arkansas River because the United States, in a treaty entered into prior to Oklahoma's admission to the Union, had conveyed those lands to Indian tribes (*id.* at 633-634). It is, of course, irrelevant under the holding in *Choctaw Nation* whether the United States conveys fee title in submerged lands to the tribe or reserves the land to be held in trust for the tribe. Thus, in *Montana*, the Court cited *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 85, 88 (1918), for the proposition that the "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shivley*," which would defeat the new State's claim. 450 U.S. at 556. Significantly, in *Alaska Pacific Fisheries*, not only did the United States retain legal title to the bed of the navigable waters that was included in the reservation; there was no permanent conveyance to the Indians of *any* compensable property interest in those lands (248 U.S. at 87-88). Rather, the Court described the arrangement in terms that apply equally here: "The reservation was not in the nature of

a private grant, but simply a setting apart, 'until otherwise provided by law,' of designated public property for a recognized public purpose" (*id.* at 88).

Similarly, the Court observed in *Holt State Bank* that there was "nothing in [the treaty] which even approaches a *grant* of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future State*" (270 U.S. at 58-59 (emphasis added)). This passage plainly implies that a grant is not the only means by which the State's title will be defeated, if "anything" else sufficiently "evinces a purpose" to appropriate the property to another use. Further light is shed on this passage by the Court's observation earlier in the same paragraph that the reservation in question "was not *intended*" to "operate[] as a disposal of lands underlying navigable waters within its limits" (*id.* at 58 (emphasis added)); the Court did not suggest that Congress was without constitutional authority to make a "disposal" by reservation.

3. Petitioner necessarily concedes that the United States, prior to statehood, may grant submerged lands to a private party, and thereby defeat a new State's claim. Petitioner makes that concession even though such a conveyance places the property beyond the control of both the United States and the State, and may thereby frustrate the sovereign ability of either to regulate and control the use of the lands to protect the public interest in the use of the overlying waters. It would be anomalous indeed if the United States were to be barred by the Constitution from disposing of the very same lands to itself, in order to further what Congress has determined to be important *public* purposes.

Certainly the purposes underlying the equal footing doctrine and its rebuttable presumption against pre-statehood conveyances by the United States do not suggest that anomalous result. If the lands are placed in reserved status, there is no "separation from sovereignty"

(*United States* v. *Oregon*, 295 U.S. at 14). Congress, in providing for the administration of the lands, may take account not only of the interests of the Nation as a whole that underlie the federal reservation, but also of any distinct responsibility, in the nature of a public trust, that a State or territory might be thought to have as regards the lands. Cf. *Kleppe* v. *New Mexico*, 426 U.S. 529, 545-546 (1976); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920).[5]

Nor does a federal reservation of the lands, unlike a grant to a private party, foreclose the possibility that the State may ultimately acquire title. For example, the reservation mandated by the 1888 and 1890 Acts in this case was not irrevocable; it continues only "until otherwise provided by law" (26 Stat. 391). If a State is formed in the territory in which the lands were situated at the time of such a reservation, and if Congress then determines that the lands are no longer needed for the special federal purpose that led to their reservation, Congress retains the authority to remove the submerged lands from the reservation, restore them to their prior status as unappropriated lands of the United States, and elect to pass them to the State. See Pet. App. 41a.

4. The effect of a federal reservation on the operation of the equal footing doctrine is but one aspect of the familiar relationship between the United States and the new States upon their admission to the Union. For example, Section 6 of the Utah Enabling Act (ch. 138, 28 Stat. 107), states that the grants of school sections and the indemnity selections shall not apply at any time to "sections embraced in permanent reservations for national purposes" and that no "lands embraced in In-

[5] The jurisdiction of the new State with respect to the waters overlying the reserved lands and any conduct occurring on those waters and lands would not be ousted by the reservation, except to the extent preempted by federal law. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917).

dian, military, *or other reservations of any character*" shall be subject to the grant and indemnity provisions "until the reservation shall have been extinguished and such lands be restored to and become part of the public domain" (*id.* at 109 (emphasis added)). See *United States* v. *Wyoming*, 331 U.S. 440, 445-446, 454-455 (1947); *Andrus* v. *Utah*, 446 U.S. 500, 506-507 (1980). Thus, the Utah Enabling Act, consistent with the relationship of the United States and the States under the Supremacy Clause, embodies the principle that lands reserved for a federal purpose pursuant to federal law are not among the unappropriated lands that are to be granted to a State upon its admission to the Union. In the absence of a reservation for a specific federal purpose, lands underlying navigable waters likewise remain unappropriated, "to be granted to such States when they enter the Union" (*Montana*, 450 U.S. at 551), albeit by operation of the equal footing doctrine. But if there has been a federal reservation, those lands neither pass to the State under the equal footing doctrine nor become available for selection by the State in satisfaction of statutory grants.

5. Finally, petitioner's submission that a federal reservation of lands underlying navigable waters cannot defeat a new State's title has been rejected by the only two courts of appeals that have squarely considered the issue—the Tenth Circuit in the instant case and the Ninth Circuit in two earlier decisions. In *United States* v. *Alaska*, 423 F.2d 764, 766-767, cert. denied, 400 U.S. 967 (1970), the Ninth Circuit held the reservation of the bed of a navigable lake, as part of federal wildlife refuge (see *Udall* v. *Tallman*, 380 U.S. 1, 5 (1965)), defeated Alaska's claim that title had passed to it upon admission to the Union. In a subsequent decision, the Ninth Circuit held that an Executive Order issued in 1915, which withdrew lands beneath tidal waters in Anchorage for construction of terminal facilities and docks for the Alaska Railroad, prevented title from passing to the State. *United States* v. *City of Anchorage*, 437 F.2d 1081, 1082-1085 (1971). Although the federal

statute did not by its terms authorize the reservation of lands underlying navigable waters, the court, noting the need for a railroad to develop the isolated interior and the need for terminal facilities for such a railroad, found that the reservation of the tidelands for the facilities was a "public exigency." *Id.* at 1084-1085. The court below correctly followed those Ninth Circuit decisions here (Pet. App. 8a).[6]

II. THE BED OF UTAH LAKE DID NOT PASS TO THE STATE UNDER THE EQUAL FOOTING DOCTRINE BECAUSE CONGRESS, IN THE SUNDRY APPROPRIATIONS ACTS OF 1888 AND 1890, RESERVED THE BED "AS THE PROPERTY OF THE UNITED STATES" FOR USE AS A RESERVOIR SITE

As we now explain, Congress has expressly reserved the bed of Utah Lake in federal ownership. Utah Lake was formally selected as a reservoir site by the Geological Survey in 1889, pursuant to the 1888 Act. The record unequivocally demonstrates, and both courts below found, that this selection included the bed of the Lake. By operation of the 1888 Act, "all the lands" so selected were automatically reserved "as the property of the United States," until further provided by law. After the Geological Survey informed Congress of the selection of the bed of Utah Lake, Congress in 1890 ratified the selection

[6] Petitioner also relies (Pet. Br. 19) on *United States* v. *California*, 436 U.S. 32 (1978). At issue in that case, however, was a post-statehood reservation by the President pursuant to the Antiquities Act. The reservation added to a national monument the submerged bed of the Pacific Ocean for one nautical mile around each of the islands in the monument. The Court held that the 1949 reservation did not prevent California from acquiring title to those lands pursuant to the Submerged Lands Act of 1953. The case therefore merely involved an interpretation of the Antiquities Act and the Submerged Lands Act. It did not hold, as petitioner argues, that the United States is *constitutionally* foreclosed, *prior* to statehood, from reserving rights in submerged federal lands, with the effect of defeating a new State's claim under the equal footing doctrine.

of that and other reservoir sites and continued their status as reserved lands of the United States, once again "until otherwise provided by law." Since 1890, Congress has not removed the lands underlying Utah Lake from their reserved status or otherwise provided by law for their disposition. By virtue of these statutory reservations in 1888 and 1890, ownership of the bed of Utah Lake did not pass to the State upon its admission to the Union, but instead remains in the United States.

A. The Administrative Selection of Utah Lake As a Reservoir Site Specifically Included the Bed of the Lake

The record clearly establishes that the lands underlying Utah Lake were selected as a reservoir site pursuant to the 1888 Act. In his letter of April 6, 1889, Major John Wesley Powell, the Director of the Geological Survey, informed the Secretary of the Interior that the "site of Utah Lake"—"together with all lands situate within two statute miles of the border of said lake at high water"—had been selected as a reservoir site "in conformity with the act approved October 2, 1888" (J.A. 19). The phrase "site of Utah Lake" in this context connotes not merely topographical location, but also the lands on which the reservoir would actually be situated.[7]

Thereafter, in the Tenth Annual Report of the Geological Survey, which was formally transmitted to Congress, Major Powell stated that a Mr. Newell had been sent to examine Utah Lake "with reference to its capacity for a reservoir site," in order that he might "furnish the specifications for its withdrawal as such under the law, so far as the *lands covered or overflowed by it* or the lands bordering upon it were still public lands"

[7] See IX *Oxford English Dictionary* (1933 ed.) (def. 3 of "site": "The ground or area upon which a building, town, etc., has been built, or which is set apart for some purpose. Also, in mod. use, a plot, or number of plots, of land intended or suitable for building purposes"); *Webster's Third New International Dictionary*, at 2128 (1976) (def. 2b: "a space of ground occupied or to be occupied by a building").

(*id.* at 88) (J.A. 25) (emphasis added)). See also *id.* at 63 (J.A. 24) (listing "Utah Lake" among "Reservoir Sites Selected").[8] In the Eleventh Annual Report, Congress was informed that a "careful survey" had been made of Utah Lake during the intervening year, and that the "segregation" of the Lake as a reservoir site included "*not only the bed* but the lowlands up to mean high water" (*id.* at 184) (J.A. 29) (emphasis added).[9]

As the district court found on the basis of this evidence, "[t]he language used in the correspondence and documents surrounding the 1889 withdrawal expressly includes the bed of Utah Lake" (Pet. App. 38a). The court of appeals affirmed this finding, observing that "[t]he language of these documents reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection" (*id.* at 13a).[10] Petitioner does not contend that this concurrent finding by the courts below is clearly erroneous (see Pet. Br. 36 n.19), and it therefore is controlling here.

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[8] The Secretary of the Interior stated in his report to the President, which also was transmitted to Congress, that reservoir sites had been selected in several States and Territories, including Utah, and that "those selections have been approved by the Department" (Tenth Annual Report, *supra*, at xxiii-xxiv). See also J.A. 21, 22.

[9] The Eleventh Annual Report listed each section of land that had been segregated at the Utah Lake site, for a total of 125,440 acres (*id.* at 184-189) (J.A. 29-38)), and included a map showing the Lake and the adjacent parcels that had been withdrawn (*id.* Plt. xcv). This Report also contained a separate narrative account of water conditions in the Utah Lake water system (*id.* at 70-74), describing the way in which the Lake could capture and spread flood waters over a broad basin, from which they could be gradually released through the river below (*id.* at 71).

[10] The court of appeals also relied on the Geological Survey's Twelfth Annual Report (at 339), which informed Congress that the Survey had segregated "the land around and *under the lake*" (Pet. App. 13a (emphasis added)). This passage is quoted more fully in App., *infra*, 3a-4a.

B. By Virtue Of Its Selection By The Geological Survey As a Reservoir Site, The Bed Of Utah Lake Was Automatically Reserved By the 1888 Act

The 1888 Act provided that "*all* the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs * * * are from this time henceforth hereby reserved from sale *as the property of the United States*, and shall not be subject after passage of this act, to entry, settlement, or occupation until further provided by law" (25 Stat. 527 (emphasis added)). As a result of the Geological Survey's selection, the bed of Utah Lake was automatically reserved, by operation of the 1888 Act, "as the property of the United States." And because the relevant documents expressly include the bed of the Lake in the designation, any presumption against a pre-statehood reservation of land underlying navigable waters has unquestionably been satisfied: the intention to reserve the land was "rendered 'in clear and especial words'" and "'in terms [that] embrace[d] the land under the waters'" (*Montana*, 450 U.S. at 552, quoting *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842), and *Packer* v. *Bird*, 137 U.S. at 672).

Petitioner contends (Pet. Br. 36 n.19), however, that the administrative actions of the Secretary of the Interior and the Director of the Geological Survey are "irrelevant," because, in petitioner's view (Pet. Br. 21-31), those officials had no authority under the 1888 Act to select and withdraw the bed of the Lake. This contention is without merit. The statutory basis for the reservation of Utah Lake is compelling.

1. *The Reservation Under The 1888 Act Occurred By Operation Of Law; It Was Not An Administrative Withdrawal*

As an initial matter, petitioner errs in characterizing (Pet. Br. i, 4, 21) the reservation of the bed of Utah Lake as an *administrative* withdrawal by the Geological Survey. As the statutory text makes clear, it was the 1888 Act itself that "henceforth hereby reserved" the

bed of Utah Lake and all other land that was found to be suitable for reservoir sites.

The legislative history confirms this understanding. As passed by the Senate, the bill provided that "all the lands which may be designated for reservoirs and canals for irrigation shall be reserved as property of the United States, and shall not be subjected to entry or settlement until hereafter provided for by law" (19 Cong. Reg. 7031-7032 (1888)). This language might have been understood to leave the actual reservation of lands to Executive officials, after the lands were designated as reservoir or canal sites. The provision then was amended in the House in three respects: (i) the reservation was made to occur by operation of law; (ii) it was made effective as of the enactment date; and (iii) the scope of the reservation was expanded to include not only sites for reservoirs and canals, but also lands susceptible of irrigation. These provisions were retained in the 1888 Act as finally passed.[11]

Representative Symes explained that the House amendment had been framed "for the particular purpose of reserving from this time forth the lands which should be selected as the sites of the reservoirs" (19 Cong. Rec. 8507 (1888)). He continued (*ibid.* (emphasis added)):

> That is the intention of the amendment and its effects as it now stands. * * * [T]hat is to say, *from now on all lands selected for reservoirs, ditches, or canals shall be absolutely reserved, and that if A, B, or C in the meantime locates upon them that he shall be subject to be dispossessed*, if the sites are necessary for such purposes.

[11] The appropriations bill originated in the House, but the provision for survey and reservation of reservoir sites was added as a floor amendment (No. 119) in the Senate. 19 Cong. Rec. 7012-7032 (1888). The House refused to concur in that and other Senate amendments (*id.* at 7360, 7681-7682), and the first conference committee was unable to reach agreement on a number of amendments, including No. 119 (*id.* at 7964-7965). The House then adopted a substitute for the Senate amendment, which reduced the appropriation to $100,000 and incorporated a reservation provision that was essentially identical to the one ultimately included in the 1888 Act (*id.* at 8200, 8202, 8400, 8402, 8505, 8519, 8535, 8542-8543). However, this substitute was not accepted by the Senate until a subsequent conference committee added the final proviso, which permitted the President, by proclamation, to open any of the reserved lands to settlement under the homestead laws (*id.* at 8809, 8824, 8898-8899, 8980, 9012).

The Department of the Interior followed this interpretation in its administration of the Act. In an August 5, 1889 circular (see 21 Cong. Rec. Rec. 9156 (1890)), the Commission of the General Land Office stated that reservoir sites "are, since the passage of * * * [the 1888] act absolutely reserved from sale as property of the United States, and shall not be subject after passage of the act to entry, settlement, or occupation until further provided by law, or [until] the President, by proclamation, may open up said lands to settlement." The Attorney General later concurred in this interpretation, concluding that selection of a reservoir site results in "the reservation thereof *dating back to the passage of this act.*" 19 Op. Att'y Gen. 564, 566 (1890). Thus, Congress deemed the reservation of lands that were found to be suitable for reservoir sites and related irrigation purposes to be so imperative that it chose not to leave the reservation of those lands to the discretion of the Secretary and foreclosed the possibility that administrative delay might frustrate the reservation.[12]

2. *The 1888 Act Plainly Authorized The Selection Of The Bed Of Utah Lake As A Reservoir Site*

The first sentence of the 1888 Act clearly authorized the Geological Survey to select the lands underlying Utah Lake. That selection in turn triggered the statutory reservation of those lands pursuant to the third sentence of the Act, just discussed.

a. *The Statutory Text.* The first sentence of the 1888 Act made an appropriation of funds "[f]or the purpose

[12] The 1890 Act provides that reservoir sites selected after passage of that Act are reserved only from the date of selection, although reservoir sites (such as Utah Lake) that were located or selected prior to the 1890 Act remain segregated and reserved until otherwise provided by law. 21 Cong. Rec. 9150 (1890) (Sen. Allison).

of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and *for the selection of sites for reservoirs* and other hydraulic works *necessary for the storage and utilization of water for irrigation*" (25 Stat. 526-527 (emphasis added)). The term "sites for reservoirs" refers to the land on which the water actually would be stored. See note 7, *supra*. That interpretation may be most evident where the site consists of dry land that would be covered with water only after storage facilities are built. But the same interpretation is required where the site is a "natural reservoir" that already is covered by water in a lake. Although the lake would be converted into a reservoir for irrigation purposes (through modifications to its natural condition), the *site* for the reservoir would be the land on which the water would be stored after those modifications. Moreover, the congressional intent that the term "site" in the first sentence refer to the "lands" on which the reservoir would be situated is confirmed by the third sentence of the 1888 Act, which directly links the two terms by mandating that all the *lands* * * * selected * * * for *sites* for reservoirs" be reserved.

b. *Background and Legislative History.* For the reasons just stated, the selection of the bed of Utah Lake as a reservoir site was firmly supported by the plain language of the 1888 Act. "'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Escondido Mutual Water Co.* v. *LaJolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As petitioner concedes (Pet. Br. 22), nothing in the legislative history suggests that lands underlying navigable waters in a territory were to be excluded from the selection and reservation provisions of the 1888 Act. The very sweep of the Act's provisions for the reservation of lands sufficiently answers this or any other plea for an implied exception. After all, the bill was amended

during its consideration to provide for the reservation not only of sites for reservoirs and canals, but also of all arid lands that might be irrigated by those works (see page 24 and note 11, *supra*), which "had the practical effect of reserving all of the public lands in the West from settlement." *California* v. *United States*, 438 U.S. 645, 659 (1978).

To be sure, the reservation of the lands that were merely susceptible of irrigation was repealed two years later, in order to make those lands available for settlement. But Congress in 1890 did not disturb the statutory reservation of reservoir sites under the 1888 Act. That reservation was at the core of the all-embracing congressional intention to preserve under the ownership and control of the United States *all* federally owned lands that might be used for irrigation purposes. See pages 40-42, *infra*. "'[I]f we are to give [the statutory provision] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 521 (1982), quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966). Moreover, as we explain more fully below (pages 40-42, *infra*), the tenor of the debates on the 1888 Act reinforces the conclusion that its language must be broadly construed to embrace all potential reservoir sites that were still in federal ownership.

c. *Contemporaneous Administrative Construction.* It also is significant that the selection of the bed of Utah Lake occurred only 6 months after the 1888 Act was passed, and therefore was the product of the contemporaneous construction of the Act by those "'charged with the responsibility of setting its machinery in motion.'" *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984), quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Accord, *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 10. The Director of the Geological Survey at the time, John Wesley Powell, was known by Congress to be intimately familiar with the irrigation of arid lands, es-

pecially in Utah. His *Report on the Lands of the Arid Region*, which was completed and submitted to Congress in 1878, was a seminal work in the evolution of the Nation's reclamation policy. P. Gates, *History of Public Land Law Development* 645 (1968). In that report, Major Powell had described Utah Lake as a "natural reservoir" that could be utilized for irrigation with the addition of certain works (*Report on the Lands of the Arid Region of the United States, with a More Detailed Account of the Lands of Utah*, H.R. Exec. Doc. 73, 45th Cong., 2d Sess. 105, 120-124 (1878)), and he had urged that "[s]ites for reservoirs should be set apart, in order that no hinderance may be placed upon the increase of irrigation by the storage of water" (*id.* at 23).[13] Accordingly, when Congress passed the 1888 Act, it had every reason to expect that Utah Lake would be among the first sites selected.

Not only did Major Powell's background uniquely qualify him to interpret and implement the statutory directive; he proposed to Congress the very language in the first sentence of the 1888 Act pursuant to which the bed of Utah Lake was selected.[14] For this reason as well,

[13] The *Report on the Lands of the Arid Region* was transmitted to the Speaker of the House by the Secretary of the Interior, who "commend[ed] the views set forth by Major Powell * * * to the consideration of Congress" (H.R. Exec. Doc. 73, *supra*, at iii-iv).

[14] On March 20, 1888, the President signed a joint resolution that directed the Geological Survey to examine the "practicality of constructing reservoirs" and other factors bearing on the question of water storage for irrigation. Jt. Res. No. 7, 50th Cong., 1st Sess., 25 Stat. 618; 19 Cong. Rec. 1766, 1977 (1888). The Senate then passed a resolution on March 27, 1888, directing the Secretary to report on what appropriation would be necessary for that purpose, segregating lands susceptible of irrigation, and "designating places for reservoirs, canals and other hydraulic works." 19 Cong. Rec. 2428-2429 (1888).

In response to the Senate resolution, a report prepared by Major Powell was submitted to the Senate by the Secretary on May 11, 1888. Tenth Annual Report, *supra*, at 8-9. That report contained proposed language (see *id.* at 14) for the appropriations bill that was identical to the first sentence of the 1888 Act as eventually

Major Powell's contemporaneous selection of Utah Lake is entitled to special weight. *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940).

C. Congress Ratified The Selection Of The Bed of Utah Lake As A Reservoir Site in 1890 And Retained It In Reserved Status

The statutory basis for the reservation of the bed of Utah Lake does not derive from the 1888 Act alone. The selection of the Lake as a reservoir site in 1889 was brought to the attention of Congress on a number of occasions, and Congress then ratified the selection of that and other reservoir sites in the 1890 Act. The designation of the lands underlying Utah Lake as a reservoir site was formally reported to Congress in at least three Annual Reports of the Geological Survey, the first of which was submitted to Congress well before it passed the 1890 Act. See pages 21-22, *supra*.[15] In addition, the

enacted, with two exceptions: (i) it did not contain the reference in the 1888 Act to the use of reservoirs for "prevention of floods and overflows"; and (ii) it provided for the appropriation of $250,000, rather than $100,000. See 19 Cong. Rec. 8462 (1888) (Rep. Forney) (referring to Major Powell's proposed amendment).

[15] The Tenth Annual Report was dated July 25, 1889 (*id.* Pt. 2, at 1) and was communicated to Congress at the beginning of the Fifty-First Congress (*id.* at cover), which commenced on December 2, 1889 (21 Cong. Rec. 27, 79 (1889)). See *id.* at 9146-9151. The "careful survey" of Utah Lake and the detailed designation of the sections reserved, which were described in the Eleventh Annual Report (see page 22, *supra*), obviously had also been completed before the 1890 Act was passed, because the 1890 Act became law on August 30 and the Eleventh Annual Report was submitted to the Secretary on September 1, 1890 (*id.* Pt. 2, at i).

The significance of these reports is underscored by the fact that the 1888 Act itself required the Director of the Geological Survey to report annually to Congress on the irrigation survey (25 Stat. 526-527). The selection of the beds of some existing lakes as reservoir sites also was brought to Congress's attention in a report to the Senate by the Secretary on July 30, 1890, while Congress was debating the 1890 Act (see note 17, *infra*), in response to a Senate resolution of July 10 (21 Cong. Rec. 7087 (1890)). See S. Exec.

use of Utah Lake as a reservoir and its selection as a reservoir site pursuant to the 1888 Act were discussed during extensive hearings held in the Spring of 1890 by committees in both the Senate and the House. Those hearings were convened for the specific purpose of evaluating the irrigation survey funded by the 1888 Act, the suitability and selection of reservoir sites, and the promotion of irrigation in the arid region generally.[16]

Approximately six months after completion of the hearings, and after many days of floor debate regarding the 1888 Act and the Nation's irrigation policy,[17] Congress

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Doc. 199, 51st Cong., 1st Sess. 1 (1890) (referring to survey methods "[i]f the land reserved for the reservoir is not covered by the water of a lake," thereby making clear that some lands *were* covered by a lake); see also *id.* at 3.

[16] Major Powell's testimony before the House Committee is reproduced in the Eleventh Annual Report (at 203-289). In that testimony, he described Utah Lake as a "natural reservoir" that could be utilized for irrigation purposes with a relatively small expenditure of money (*id.* at 232-234; see also *id.* at 70-74).

Excerpts from Major Powell's testimony before the Senate Committee are reproduced in that Committee's comprehensive six-volume report on irrigation. S. Rep. 928, 51st Cong., 1st Sess. (1890). Utah Lake was included in a list furnished by Major Powell of all reservoir sites that had been selected and defined as of January 1890 (*id.* Pt. 4, at 81, 83-84). Major Powell testified that "Utah lake is a natural reservoir for the Jordan [River]" and that it could be used as a reservoir by damming the outlet, although the increase in the water level could flood some settled tracts bordering the Lake (*id.* at 39). He also testified that "the people of the western region were exceedingly anxious" that reservoir sites be promptly selected and that, based on his experience, he "knew that Utah Lake was a site" (*id.* Pt. 1, at 161). See also *id.* at 41-46.

The Senate Committee, accompanied by Major Powell, also conducted extensive field hearings, including a session in Salt Lake City. Once again, there was testimony about the use of Utah Lake as a reservoir (*id.* Pt. 3, at 14, 25, 29, 35, 39, 41, 48, 54, 55, 60-61). The Chairman of the Committee specifically referred to the reservation of land at Utah Lake, which he noted would prevent people from crowding onto land that was becoming exposed as the Lake receded during a dry period (*id.* at 29).

[17] See 21 Cong. Rec. 6045-6059, 7269-7291, 7319-7333, 7341-7361, 7393-7417, 7722-7729, 7765-7782, 7875-7879, 7928-7936, 7978-7989, 8275-8280, 8323-8332, 8426-8427, 9137-9140, 9145-9157 (1890).

passed the 1890 Act. That Act revised the 1888 Act in critical respects. But although the selection of the bed of Utah Lake had been called to its specific attention, Congress declined to disturb either that selection or the statutory interpretation on which it was based. Compare *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982). To the contrary, Congress in 1890 expressly preserved all prior selections of reservoir sites. There was widspread public opposition in the West to the broad language of the 1888 Act that withdrew from settlement not only reservoir sites, but also all public lands that would be susceptible to irrigation if reservoirs were constructed at those sites. See *California* v. *United States*, 438 U.S. at 659; *Ide* v. *United States*, 263 U.S. 497, 501-502 (1924); P. Gates, *supra*, at 641-642.[18] The 1890 Act therefore repealed the 1888 Act insofar as it "provide[d] for the withdrawal of the public lands from entry, occupation and settlement" (26 Stat. 391).

There was no comparable degree of opposition to the reservation sites pursuant to the 1888 Act. In fact, the debates reflected considerable support for the proposition that reservoir sites still owned by the United States should be kept out of the hands of speculators and monop-

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[18] The proviso to the 1888 Act would have permitted the President to open under the homestead laws any of the lands that were reserved by the 1888 Act, thereby permitting the Secretary to limit the impact of the statutory reservation of irrigable lands. However, the opening of irrigable lands to homesteading was delayed pending the survey of each reservoir site and adjacent lands. P. Gates, *supra*, at 641-642. Moreover, the President's authority to open reserved lands under the homestead laws was far narrower than the bar erected by the reservation, which also prevented entries under the mining laws (*Colomokas Gold Mining Co.*, 28 Pub. Lands Dec. 172, 174 (1899); cf. *John U. Gabathuler*, 15 Pub. Lands Dec. 418 (1892)); the timber and stone laws (*W.D. Harrigan*, 29 Pub. Lands Dec. 153 (1899)); and the Desert Land Act (21 Cong. Rec. 7780 (1890)); P. Gates, *supra*, at 641-642. The reservation also bars a State from selecting the lands under various statutory provisions for school-section and similar grants. See page 19, *supra*.

olists; that settlement or other disposal of potential reservoir sites might impede development by leading to claims for compensation when the works were to be built; and that reservoir sites should be preserved under federal control pending future legislation providing for orderly development of those sites.[19] Therefore, in an excepting clause in the 1890 Act, Congress specified that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888] act, until otherwise provided by law" (*ibid.*). Since the bed of Utah Lake had been "[t]heretofore * * * selected" as a reservoir site, the 1890 Act expressly ratified that selection and continued the reservation of the bed "as provided by [the 1888] Act"—*i.e.*, "as the property of the United States" (25 Stat. 527)—"until otherwise provided by law" (26 Stat. 391). Even if there were some doubt under the 1888 Act standing alone regarding the authority of the Geological Survey to select the bed of Utah Lake as a reservoir site, those doubts were erased by this explicit directive in the 1890 Act that reservoir sites previously selected "shall remain segregated and reserved." See, *e.g.*, *CFTC* v. *Schor*, slip op. 12; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969).

D. Congress Again Declined To Disturb The Reservation of Utah Lake in 1891 and 1897, When It Amended The 1888 and 1890 Acts

Congress again declined to disturb the reserved status of the bed of Utah Lake in 1891 and 1897, when it revisited the subject of irrigation and the use of the reservoir sites reserved by the 1888 Act.

1. The Act of March 3, 1891, ch. 561, 26 Stat. 1095 *et seq.*, made a number of the major revisions of the general land laws that were pending before Congress

[19] See, *e.g.*, 21 Cong. Rec. 6048 (Rep. Sayers); *id.* at 6050 (Rep. Mansur); *id.* at 6052 (Rep. DuBois); *ibid.* (Rep. Oates); *id.* at 6053 (Rep. Hemphill); *id.* at 6054 (Rep. Bynum); *id.* at 6055 (Rep. Morrow). Indeed, in the second part of the savings clause in 1890, Congress continued the authority of the Geological Survey to select reservoir sites in the future.

when it passed the 1888 and 1890 Acts. It repealed the Timber Culture and Preemption Acts and tightened the Desert Land Act to guard against abuses (§§ 1, 2, 4, 26 Stat. 1095-1097; P. Gates, *supra*, at 642), and it granted private individuals and corporations rights of way through "the public lands and reservations of the United States" for the construction of reservoirs, canals, and ditches for irrigation, provided that there was no interference with the government's right to occupy its reservations. §§ 18-21, 26 Stat. 1101-1102. Finally, in Section 17, Congress provided that reservoir sites selected or to be selected pursuant to the 1888 Act "shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs" (26 Stat. 1101; 43 U.S.C. 663). This amendment was enacted several months after the Geological Survey reiterated to Congress in its Eleventh Annual Report that the bed of Utah Lake had been selected as a reservoir site. But although the 1891 amendment reflected congressional concern that the reservation of reservoir sites might sometimes exceed the proper scope of the 1888 Act, Congress left in place the reservation of Utah Lake under the 1888 Act.

2. The 1891 Act appeared to authorize the private occupation and development of *all* reservoir sites on public lands and reservations, but it was administratively construed by the Secretary not to apply to reservoir sites reserved by the 1888 Act. 29 Cong. Rec. 1948 (1897) (remarks of Rep. Lacey). Accordingly, Congress expressly provided in the 1897 Act that *all* reservoir sites reserved or to be reserved by the United States were to be open to use and occupation under the 1891 Act. Act of Feb. 26, 1897, ch. 535 (29 Stat. 599, 43 U.S.C. 664); see *California* v. *United States*, 438 U.S. at 659. But Congress once again declined to disturb the 1888 Act reservations themselves.

Significantly, moreover, Congress provided in the 1897 Act that "any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an indi-

vidual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe" (29 Stat. 599). In so doing, Congress declined to adopt proposals to convey reservoir sites to the States. 29 Cong. Rec. 1847 (1897) (remarks of Rep. Cannon); *id.* at 1950 (remarks of Rep. Bell); see P. Gates, *supra*, at 647-651. Thus, even where a State proposed to develop the waters within its borders for the benefit of its citizens, Congress chose in the 1897 Act to retain under *federal* ownership and control the public lands that had been placed in reservation status by the 1888 Act. See *California* v. *United States*, 438 U.S. at 662, quoting 29 Cong. Rec. 1952 (1897) (remarks of Rep. Lacey) (" 'The reservoirs in which the water is stored belong to the government' "). The 1897 Act therefore further undermines petitioner's argument that Congress intended in the 1888 Act to exclude from coverage those reservoir sites that happened to underlie navigable waters in the territories, and instead to provide for title to and control over those sites to pass to the new States that might be created.

E. Petitioner's Contention That The Background Of The 1888 Act Supports An Implied Exclusion Of The Bed Of Utah Lake Is Without Merit

Petitioner essentially ignores the dispositive indicia of legislative intent discussed above: (i) the broad language of the 1888 Act providing for the selection of "reservoir sites" and mandating the reservation of "all the lands" so selected; (ii) the significance of Major Powell's involvement in the drafting and contemporaneous implementation of the statutory language; (iii) Congress's awareness of the selection of the lands underlying Utah Lake; and (iv) Congress's subsequent ratification of the reservation of that and other sites in the 1890 Act. Instead, petitioner relies on two inferences it seeks to extract from the background and legislative history of the Act.

First, petitioner attaches significance to the absence of any specific reference in the legislative history of the 1888 Act to what it labels "sovereign lands" (the beds

of navigable waters), as distinguished from "public lands." See Pet. Br. 27-29. Second, petitioner contends that the purpose of the 1888 Act was solely to prevent speculation in and monopolization of lands that would be suitable sites for reservoirs or be irrigated by them. In petitioner's view, this purpose did not extend to so-called "sovereign lands," because it was impossible for settlers to occupy lands that were under water. See Pet. Br. 24-26, 29-30, 33-34. For these reasons, petitioner urges that the 1888 Act should now be construed—nearly 100 years after it was passed and the bed of Utah Lake was reserved—to have implicitly excluded Utah Lake from coverage. There are numerous flaws in this analysis.

1. Petitioner's extended discussion of the term "public lands" and a supposed distinction between those and "sovereign lands" has no relevance to this case. The words "public lands" do not even appear in the 1888 Act. Whether those words should be understood to include the bed of Utah Lake therefore is beside the point. By contrast, the language that does appear in the 1888 Act broadly provides for the selection of reservoir sites throughout the "arid region" and for the automatic reservation of "all the lands" so selected. Petitioner has not shown that this expansive language was understood by anyone to exclude the bed of Utah Lake, which was widely regarded as a "natural reservoir" at the time the 1888 Act was passed and was selected as a reservoir site immediately thereafter. Nor does petitioner cite any occasion in the legislative history on which a Member used either the statutory language or petitioner's term ("public lands") in contradistinction to the term "sovereign lands" or its equivalent. In fact, the term "public lands" does not even appear in *any* of the excerpts that petitioner quotes (Pet. Br. 27-28 & n.15) from the legislative history.

Moreover, this Court has made clear that even where a statute does expressly refer to "public lands," the bed of a navigable body of water is not necessarily excluded and the statute's coverage must be determined by regular

guides to legislative intent. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116-118 (1949). In the instant case, the term "public lands" readily would be understood to include the bed of Utah Lake, because the bed was in "public" ownership in 1888. See, *e.g.*, 43 U.S.C. 1702(e); 16 U.S.C. 3102(1), (2), and (3). Moreover, in *Choctaw Nation*, the Court described "lands underlying navigable waters" as "public lands" (397 U.S. at 633); the Geological Survey, in its Tenth Annual Report, described the lands covered by Utah Lake as "public lands" (*id.* at 88); and the 1890 Act referred to the lands withdrawn by the 1888 Act, which Congress knew to include the bed of Utah Lake, as "public lands" (26 Stat. 691).[20]

2. a. As we have shown, the plain language of the 1888 Act provided for the reservation of *all* lands in the

[20] The Court in *Hynes* distinguished the very decisions upon which petitioner relies (Pet. Br. 23-24) for its "public lands" argument. The Court noted that several of those decisions "ha[d] nothing to do with tidelands or coastal waters [*i.e.*, 'sovereign lands']," but instead concerned "whether the lands in question were subject to disposal as property of the United States, *i.e.*, public lands" (337 U.S. at 114 n.39, citing *Newhall* v. *Sanger*, 92 U.S. 761, 763 (1875), and *Barber* v. *Harvey*, 181 U.S. 481, 490 (1901)). The question in *Newhall* and *Barber* was whether disposal was prevented by private rights in the land. Here, by contrast, no private rights posed an impediment to Congress's reservation of the lake bed in 1888, and the lands underlying Utah Lake therefore "were subject to disposal as property of the United States, *i.e.*, public lands" (337 U.S. at 114 n.39).

With respect to *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), the Court explained in *Hynes* that the tidelands already had passed to the State under the equal footing doctrine and therefore were not public lands of the United States (*id.* at 114 n.39, citing 296 U.S. at 17, 22). In *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894), the Court held that scrip authorizing the entry of "unoccupied and unappropriated public lands" did not apply to tidelands. This case, of course, concerns "reserved," not "unappropriated," public lands (25 Stat. 527). Moreover, as noted in *Hynes* (337 U.S. at 115), *Mann* involved an allegedly permanent disposition into private hands, not a reservation of land in federal ownership and control; accordingly, the Court in *Mann* simply invoked the established presumption against reading general legislation granting public lands as applying to tidelands (153 U.S. at 284).

arid region that were suitable reservation sites, without exception for lands that happened to underlie existing lakes, whether navigable or not. A court cannot fashion an exception to such all-inclusive statutory text merely because there is not a specific reference in the legislative history to the precise factual circumstances before the court. *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 800-801 (1984). The Court has applied this principle of statutory construction to defeat claims by a State, including a claim to the bed of a navigable river under the equal footing doctrine. See *Block* v. *North Dakota*, 461 U.S. at 287-288 & n.24, 291; *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159-162 & n.18 (1983).

b. Indeed, there would have been no occasion for Congress to consider a distinction between lands underlying navigable waters and other types of land subject to the 1888 Act. In the States of the arid region that had been admitted to the Union by 1888, the beds of navigable rivers and lakes already had passed to the States. Those beds were no longer "property of the United States" subject to reservation under the 1888 Act. By the same token, in the territories, such as Utah, it was "well settled" that "the United States * * * [had] the entire dominion and sovereignty, national and municipal, Federal and state" (*Shively*, 152 U.S. at 48). Congress therefore had the power to dispose of public lands below navigable waters in any territory of the United States for appropriate public purposes (*ibid.*), "just as it [could] dispose of other public lands" (*Choctaw Nation*, 397 U.S. at 633). Those appropriate public purposes plainly included the development of the water resources of the Utah Territory. There accordingly is no reason why the Fifty First Congress should have hesitated to include the beds of navigable waters in that Territory within the deliberately comprehensive reservation of *all* lands of the United States in the arid region that were suitable for reservoir purposes.

In the absence of a clear indication of congressional intent, a court may be reluctant to infer that Congress

has made a *private* grant of lands underlying navigable waters, because that would permanently remove the lands from the governmental control in the public interest that is an important incident of sovereignty. *Haynes*, 337 U.S. at 102-106; *Alaska Pacific Fisheries*, 248 U.S. at 87-88; *Illinois Central R.R.*, 146 U.S. at 452-458. By contrast, where, as here, the legislation would retain the submerged lands in federal ownership for a special federal purpose, the lands would remain subject to sovereign control, including the power of Congress to permit the lands to pass to a new State if the reservation no longer appeared necessary. For this reason, and because the navigability of overlying waters would not have any bearing on the suitability of a site for a reservoir, Congress would not have attached significance to whether some lakes or rivers affected by the 1888 Act were navigable. The absence of any affirmative indication in the legislative history of a congressional intent to treat submerged lands differently from all other federal lands therefore undermines rather than supports petitioner's argument for an implied exception to the broad language of the 1888 Act.

3. a. The purposes to be served by the 1888 Act likewise do not support an implied exception for Utah Lake. Petitioner focuses only on the purpose of preventing monopoly and speculation and the impediments to development that could result from the need to compensate individuals who might have entered lands that would be needed for an irrigation propect. Pet. Br. 24-26, 29-30, 33-34. But even if petitioner's narrow conception of the Act were correct, those purposes in fact *would* have been served by application of the Act to the bed of Utah Lake. As the court of appeals observed, "although officials of the [Geological Survey] initially thought that the water level of Utah Lake should be *raised*, subsequent studies indicated that the water level should be *lowered* below the natural shoreline," in order to minimize the amount of water lost to evaporation (Pet. App. 19a-20a, citing S. Rep. 928, *supra*, Pt. 3, at 61 (emphasis added)). If the water level were lowered, much of the lake bed would

have been exposed and settlers might have entered those lands, thereby posing the very potential for monopolization and speculation through abuse of the general land laws that Congress sought to prevent.[21]

Moreover, even if the normal level of the Lake had been lowered, the water occasionally would have risen to its previous level in times of flooding, which would have inundated the lands occupied by any settlers who moved onto the newely exposed lake bed. This potential in fact was explained in the extensive discussion of Utah Lake in the Geological Survey's Twelfth Annual Report (App., *infra*, 3a-4a). If settlement had been permitted to occur, the government might have been subject to monetary claims for flooding that resulted from the operation of the reservoir. *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 632-636 (1961).[22] Compensation also might have been required for the use of any nonfederal lands, submerged or exposed, that were required for the construction of dams, dikes, or other works. Thus, there was the potential at Utah Lake, as else-

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[21] Petitioner contends (Pet. Br. 25, 29, 33) that it would have been legally impossible for individuals to settle on the lands underlying Utah Lake because the general land laws did not apply to the beds of navigable waters. It is by no means clear, however, that the general land laws would have been inapplicable to the portions of the bed that were to be exposed when the water level was permanently lowered. In any event, Congress reasonably could decide to include in the 1888 Act an additional and comprehensive prohibition against the use and occupation of all reservoir sites, rather than to leave their protection to the notoriously inadequate safeguards of the then-existing general land laws. Moreover, the prohibition in the 1888 Act upon which petitioner relies is not on its face limited to dispositions of land that might occur under the general land laws of the United States. By its terms, that provision bars *any* "entry, settlement, or occupation" of reserved lands, even by a future State (or its grantee) under color of an equal footing claim.

[22] Similar disputes resulting from changes in the level of Utah Lake had occurred in the past. See note 16, *supra*; S. Rep. 928, *supra*, Pt. 6, at 39; Eleventh Annual Report, *supra*, at 233; Twelfth Annual Report, *supra*, at 336.

where, for settlement to impede the use of the lands for a reservoir site.[23]

b. In any event, petitioner errs in contending that the terms and purposes of the 1888 Act were limited to protecting against monopoly, speculation, and other impediments to development that could have resulted from private settlement on lands owned by the United States. The 1888 Act did not merely provide, in the final passage upon which petitioner relies (Pet. Br. 24-25), that the lands reserved for reservoir and other purposes would "not be subject * * * to entry, settlement or occupation." In the court of appeals' words, the 1888 Act also "provide[d] broadly" (Pet. App. 14a) that "all the lands" selected were to be reserved from sale "as the property of the United States."

In addition, the background and legislative history of the 1888 Act reveal that the lawmakers had a vision that transcended the immediate need to protect federally owned lands from improvident conveyance under then-existing land laws. The debates reveal an overarching desire to freeze the status of the designated lands, in order to assure that they would indisputably remain the property of the United States pending the determination by a future Congress as to how they should be used or disposed of. Some Members suggested that the Federal Government itself might eventually develop the sites by constructing large-scale irrigation projects—a course Congress ultimately chose 13 years later when it passed the Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388 *et seq.* See *California* v. *United States*, 438 U.S. at 663-664; P. Gates, *supra*, at 643-656. Thus, Representative Vandever inquired rhetorically: if Congress can appropriate funds to remove "impediments from the navigation of streams whose sources are in the mountains," why "is it not proper to furnish great reservoirs from which water can be obtained to irrigate and fertilize the thirsty plains below, thus adding to the general wealth of the country

[23] Utah Lake now is included in plans for development of the Banneville Unit of the Bureau of Reclamation's Central Utah Project. See *Marsh* v. *Utah*, 740 F.2d 799, 800-801 (10th Cir. 1984).

incalculable millions by increase of the public domain for settlement?" 19 Cong. Rec. 8461 (1888). Representative O'Neill noted that private control of lands surrounding the Humboldt River in the Utah Valley had caused "injury" to the area's agricultural development, and he hoped that "millions" would be invested in a government reservoir system at the foot of the Rocky Mountains (*id.* at 8474-8475). And Representative Herbert, who opposed the reservation, also asserted that its true purpose was to establish federal involvement in reservoir construction and management (*id.* at 8471-8473).

Similarly, Senator Teller stated (*id.* at 7017-7018 (emphasis added)):

> It is not necessary that the United States go to the expense of building these dams, *but they must be put on land of the United States.*
>
> * * * * *
>
> But the time will come when the Government of the United States will have to do what every other government in the world has done in the arid regions—put out its money to build reservoirs.

Senator Teller later suggested in the alternative that once the data had been collected by the Geological Survey, Congress might convey the reservoir sites to the States (*id.* at 7027). Senator Manderson of Nebraska stated that diversions by Colorado ranchers "threaten[ed] to destroy the Platte [River] for the uses of Nebraskans" (*id.* at 7020). He continued (*ibid.*; emphasis added):

> [O]ne of the ways, perhaps the only way, by which the difficulty can be remedied, is that *the Government of the United States should take hold of this matter*, and prevent the improper or improvident use of the waters of these great rivers by those who live near their sources. *By the building of reservoirs such as are contemplated by this amendment*, it would be within the authority and power of the officers of the Government charged with that duty to see to it *that there was maintained in those reservoirs a proper supply of water* during the time when water was needed, *either for purposes of navigation or for purposes of irrigation on the lower portion of the rivers.*

Representative Symes disputed the notion that the 1888 Act committed the Federal Government to future irrigation projects, and, like Senator Teller, he foresaw the possibility that Congress might turn over "these reservoirs * * * to the States" (*id.* at 8510). And although Representative Felton believed that reservoir development would not be undertaken by the Federal Government, but by private capital, he foresaw a distinct federal role in the imposition of restrictions that would prevent private developers from becoming unfettered "lords of the manor, the soil, and the water" (*id.* at 8476). Representative Felton explained that the reservation of lands was necessary so that "at a future time some way of disposing of them may be determined upon, the same way as they surveyed the public lands in order to determine in what way they would dispose of them" (*id.* at 8471). See also *Ide v. United States*, 263 U.S. at 501-502 (the United States had not yet "become engaged in the reclamation of its arid public lands," but "was actively conducting investigations and collecting data with a view to developing and formulating a feasible plan for taking up and prosecuting that work").

Congress's options for the reserved sites were wide-ranging. The common theme of the supporters of the 1888 Act was that, in order to assure Congress a meaningful choice in the future, the United States must retain ownership of the sites. The 1888 Act resulted in large part from Congress's acknowledged inability to anticipate the results of the irrigation survey it was directing or the full range of factual and legal options that might be available to it; and the language Congress chose was deliberately broad, in order to protect against the unforeseen. It therefore would be especially inappropriate to fashion implied exceptions to the broad statutory language merely because some concerns articulated by Congress might not eventuate on a particular tract of land.[24]

[24] Petitioner cites (Pet. Br. 37-38 n.21) the enacting clause and Section 20 of the Utah Enabling Act, which provided, respectively,

6. Finally, petitioner's argument wholly fails to take account of the fact that Congress ratified the reservation of the bed of Utah Lake when it passed the 1890 Act. Even if petitioner were correct that the background of the 1888 Act was ambiguous concerning the Director's statutory authority, Congress's subsequent action has rendered that ambiguity irrelevant. The 1890 Act provides that reservoir sites "[t]heretofore located or selected" shall "remain segregated and reserved from entry or settlement "as provided in [the 1888] Act"—*i.e.*, "as the property of the United States" (25 Stat. 527)—"until otherwise provided by law" (26 Stat. 391). As Congress well knew in 1890, the bed of Utah Lake had been explicitly designated as a reservoir site in 1889. See pages 29-31, *supra*. By virtue of Congress's incorporation of that designation into the 1890 Act, Congress itself expressed in "'clear and especial words'" its intention to reserve the bed of Utah Lake as the property of the United States, and Congress's action "'in terms embrace[d] the lands under the waters'" (*Montana*, 450 U.S. at 552 (citations omitted)).

for Utah to be admitted to the Union on an "equal footing" with other States and for the repeal of all Acts "in conflict with" the Enabling Act. 28 Stat. 107, 112. However, as we have demonstrated, a pre-statehood disposition by Congress of land underlying navigable waters in no way "conflicts" with the principle of equal footing. It simply removes the affected tract from the category of unappropriated lands to which the equal footing doctrine applies if a State is created in the territory. Moreover, Section 6 of the Utah Enabling Act expressly excludes from state school-section and indemnity claims all lands included within *any* federal reservation. See pages 18-19, *supra*. There accordingly is no reason to believe that Congress intended the routine repealer clause in Section 20 of that same Act to *override* the reservation of federal lands underlying Utah Lake. See *United States* v. *Alaska*, 423 F.2d at 768.

III. THE RESERVATION OF THE BED OF UTAH LAKE BY THE 1888 AND 1890 ACTS FOR USE AS A RESERVOIR SITE WAS IN FURTHERANCE OF APPROPRIATE PUBLIC PURPOSES AND THEREFORE DEFEATS THE STATE'S CLAIM OF TITLE UNDER THE EQUAL FOOTING DOCTRINE

Petitioner argues (Pet. Br. 31-34) that even if Congress did reserve the bed of Utah Lake as a statutory matter, the 1888 and 1890 Acts nevertheless were ineffective to prevent title from passing to the State under the equal footing doctrine because, in petitioner's view, no "public exigency" justified Congress's appropriation of those lands for a reservoir site. Petitioner thus argues that the 1888 and 1890 Acts are unconstitutional, at least as applied to Utah Lake. "Judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform'" (*Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13, quoting *Blodgett* v. *Holden*, 275 U.S. 152, 148 (1927) (opinion of Holmes, J.)). Petitioner clearly has not shown that Congress exceeded its constitutional authority in this case.

A. The notion that Congress had no authority to dispose of the bed of Utah Lake except upon the showing of a "public exigency" finds no support in the text of the Property Clause of the Constitution or in this Court's decisions concerning Congress's authority under that Clause as a general matter. The Property Clause on its face imposes no "public exigency" prerequisite or other limitation on the exercise by Congress of its "Power to dispose of * * * the Territory and other property belonging to the United States" (Art. IV, § 3, Cl. 2). Compare U.S. Const. Amend. V ("nor shall property be *taken* for a *public use*, without just compensation" (emphasis added)). Moreover, this Court repeatedly has held that "[t]he power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954), quoting *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("'Congress

may deal with [public domain lands] precisely as a private individual may deal with farming property. It may sell or withhold them from sale.'"); *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940), quoting *Light* v. *United States*, 220 U.S. 523, 537 (1911) ("The power over the public lands thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered.'"); see also *Kleppe* v. *New Mexcio*, 426 U.S. at 536, 539-540; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917).

B. Nor do the Court's equal footing doctrine cases support a unique constitutional requirement of a "public exigency" in the particular context of the disposition of lands underlying navigable waters.

1. As petitioner recognizes (Pet. Br. 31-32), the use of the term "public exigency" in this setting originated in *Shively* v. *Bowlby*. In *Shively*, the Court stated that it had no doubt that Congress "has the *power* to make grants of lands below [the] high water mark of navigable waters * * * *whenever* it becomes necessary * * * to carry out * * * *public purposes appropriate to the objects for which the United States hold the Territory*" (152 U.S. at 48 (emphasis added); see also *id.* at 58). The Court did not use the term "public exigency" in this formulation of Congress's power. In fact, the Court stated only that an "appropriate public purpose" is a *sufficient* condition for such a disposal; the Court did not even state that such a purpose is a *necessary* condition, and that issue remains open.[25]

[25] The Court's reference to dispositions for an appropriate public purpose was simply one of a list of purposes whose validity, the Court stated, "[w]e cannot doubt" (152 U.S. at 48). Other dispositions, based on a lesser (or no) justification, were not foreclosed. See *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 85 (1922) (it is an open question whether the United States has "unrestricted power * * *, when exclusive sovereign, to part with the bed of such a stream for any purpose," or whether disposition is proper only for "a public purpose appropriate to the objects for which the United States hold the Territory," within the meaning of *Shively*); see also *Choctaw Nation*, 397 U.S. at 647 (White, J., dissenting) (noting question left open in *Brewer-Elliott*). Although principles of state public trust law have been held to limit the

By contrast, in the passage from *Shively* in which the term "public exigency" does appear, the Court was describing not the limits on Congress's constitutional authority, but rather Congress's past policy, which in turn assisted the Court in ascertaining Congress's present intent. Thus, the Court explained that Congress had "acted upon the policy" (152 U.S. at 58) that the lands underlying navigable waters would not be granted away during the period of territorial government, "unless in case of some international duty or public exigency" (*id.* at 50, 58). Against this background of past practices, the Court found nothing in the relevant statute "indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers" (*id.* at 51).

2. In subsequent cases, the Court has quoted or cited the passage from *Shively* concerning Congress's *power* to dispose of lands underlying navigable waters "whenever" necessary to further "appropriate" "public purposes," and it has viewed the relevant question to be whether Congress *intended* to make such a disposition. In answering that question, the Court has referred to the presence or absence of a "public exigency," if at all, only as reflecting Congress's past practice and therefore as a guide to ascertaining its present intent. See *Brewer-Elliott*, 260 U.S. at 80, 83-85; *Holt State Bank*, 270 U.S. at 54-55, 58; *Choctaw Nation*, 397 U.S. at 633.

3. Most recently, in *Montana*, the Court stated that "it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency' " (450 U.S. at 552, quoting *Holt State Bank*, 270 U.S. at 55). But the Court's opinion, read as a whole, demonstrates that this statement likewise was made with reference to the intent that will be attributed to Congress, and was not intended to prescribe a constitutional limitation on Congress's power. Thus, at the outset, the Court in *Montana* quoted the *Shively* passage acknowledging Congress's power to convey submerged lands for "appropriate" "public purposes" (450 U.S. at 551), and it then stated that a Court "must not infer" such a conveyance unless the " 'intention' " was " 'made plain' " or the grant " 'in terms embraces the land under the waters' " (*id.* at 552, 554 (citations omitted)). In ruling against the Tribe, the Court simply found an insufficiently clear expression of such an intention in the Crow Treaties (*id.* at 553-555); there was no suggestion of any constitutional impediment.

As an additional consideration, the Court stated: "Moreover, even though the establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively* * * *, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' that would have required Congress to depart from its policy of reserving ownership of navigable waters for the future States," because "fishing was not important to their diet or way of life" (450 U.S. at 556). In this passage, the Court once again viewed the furthering of an "appropriate public purpose" as a sufficient constitutional justification for the exercise by Congress of its power to dispose of lands underlying navigable waters. Indeed, the Court indicated that the Executive Order reservation of submerged lands in *Alaska Pacific Fisheries* was such an occasion, because the Indians there depended upon fishing (*ibid.*). But because the Crow Indians did not depend upon fishing, the Court found no "public exigency" suggesting the need to protect a fishery on their behalf, and therefore no indication that the United States intended to depart from its usual policy of not conveying the beds of navigable rivers. *Montana* therefore is fully consistent with the Court's prior decisions holding that Congress has the power to dispose of the beds of navigable waters to further "appropriate" public purposes.

C. The conclusion that no more than an "appropriate" (*i.e.*, proper) public purpose need be shown is especially

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authority of a state to dispose of certain interests in navigable waters and the lands underlying them (see *Illinois Central R.R.* v. *Illinois*, *supra*; *Appleby* v. *City of New York*, 271 U.S. 364, 395 (1926)), the Property Clause of the Federal Constitution by its terms does not impose any such restriction.

warranted in this case, because the United States' reservation of the property for a paramount federal use was the functional equivalent of the exercise of the power of eminent domain. If the lands underlying Utah Lake already had passed to the State under the equal footing doctrine and the United States then sought to reacquire them from the State through condemnation (see *Block* v. *North Dakota*, 461 U.S. at 291; page 14, *supra*), the relevant constitutional inquiry would be whether the property was taken for a "public use" (U.S. Const., Amend. V). In 1888, however, there was no occasion for a formal exercise of the power of eminent domain or for the payment of compensation wtih respect to the bed of Utah Lake, because the United States already had complete title to and dominion over those lands while Utah remained a Territory. It would be anomalous to impose a *higher* standard of necessity in such a case than is applied when the United States seeks to acquire the bed of a navigable body of water that already is owned by a sovereign State. It follows that, at a minimum, the United States has the constitutional power to reserve or appropriate lands underlying navigable waters in a territory upon the showing that the property would be devoted to a proper "public use" within the meaning of the Fifth Amendment—which we understand to be the equivalent of an "appropriate public purpose" under *Shively* and its progeny.

"The 'public use' requirement is * * * coterminous with the scope of a sovereign's police powers," and "the Court has made clear that it will not substitute its judgment for [Congress's] judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240-241 (1984), quoting *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668, 680 (1896). Moreover, "whether *in fact* the provision will accomplish its objectives is not the question: the constitutional requirement is satisfied if . . . the . . . Legislature *rationally could have believed* that the [Act] would promote its objective." *Id.* at 242, quoting *Western &*

Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648, 671-672 (1981) (emphasis in original).

D. In this case, the reservation of the bed of Utah Lake was plainly for a "public use" or "public purpose[] appropriate to the objects for which the United States [held] the Territory"—if we assume, arguendo, that any such justification is required (see page 45 and note 25, *supra*). Both courts below held that the reservation at least satisfied this standard, in light of the important interest in setting aside land for the fair, orderly, and economical irrigation of arid lands (Pet. App. 23a, 39a-40a). At the very least, Congress rationally could have believed that these purposes would be served by the reservation of reservoir sites generally and of the lands underlying and surrounding Utah Lake in particular. In fact, petitioner does not contend that the "appropriate public purpose" standard was not satisfied in this case. Rather, petitioner argues only that a different standard should be applied. See Pet. Br. 31-34.

E. Even if petitioner were correct that this Court's decisions require the showing of a "public exigency," it is not clear that this standard would differ from that of an "appropriate public purpose." Although the word "exigency" often connotes a pressing need or sense of urgency, it does not follow that it imparts in this context a judicially enforceable standard of strict necessity. The word "exigency" also was used at the time of *Shively*, as now, to mean "[t]hat which is needed or required: demands, needs, requirements." IX *Murray's New English Dictionary* 411 (1897). In this sense, the word is essentially synonymous with "necessary." As was made clear in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court considered the scope of Congress's authority under the Necessary and Proper Clause, the word "necessary" "has not a fixed character," but rather "admits of degrees of comparison" which may "increase or decrease" the "urgency it imports" (*id.* at 414). Accordingly, because the purpose of the Necessary and Proper Clause is to facilitate the exercise of Congress's enumerated powers, not to shackle Con-

gress in its choice of options, the Court held that a showing of strict necessity is not required and that the selection of suitable means is largely committed to Congress. (*id.* at 417-421). "Let the end be legitimate," the Court stated, and Congress may pursue "all means which are *appropriate*, which are plainly adopted to that end" (*id.* at 421 (emphasis added)). The word "exigency" is of the same character as the word "necessary" in the respects relevant here. Accordingly, because the Court in *Shively*, as in *McCulloch* v. *Maryland*, was considering a subject matter (the disposition of federal property) in which Congress's authority is exceedingly broad, the word "exigency" as used therein should he understood to be the equivalent of the "appropriate public purpose" standard stated elsewhere in the *Shively* opinion. See 17 U.S. (4 Wheat.) at 422. Especially in the present context, the language of *Shively* and its progeny does not authorize the courts to second-guess the wisdom of Congress's provision for the reservation of public lands for particular public purposes merely because the reservation happens to embrace lands underlying navigable waters.

But even if a more stringent standard were intimated by the Court, it plainly was satisfied here. As we have explained (see pages 24-25, 38-42, *supra*), Congress responded to what it perceived as an urgent and compelling need to prevent speculation, monopoly, and other impediments to the use of federal lands for irrigation purposes, as well as the need to maintain the lands under federal ownership and control pending future development of reservoir sites. Indeed, against this background, the court of appeals specifically held that "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by *public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a (emphasis added)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505, provided in relevant part (25 Stat. 526-527):

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, * * * [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey under the supervision of the Secretary of the Interior shall make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoires [sic] and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after passage of this act, to entry, settlement or occupation until further provided by law:
>
> *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.[1]

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[1] The proviso was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792.

2. The Sundry Appropriations Act of August 30, 1890, ch. 837, 26 Stat. 371, provides in pertinent part (26 Stat. 391):

> [S]o much of the act of October second, eighteen hundred and eighty-eight, entitled "Any act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," * * * as provides for the withdrawal of the public lands from entry, occupation and settlement is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location of selection thereof.[2]

[2] The substance of the portion of the 1890 Act beginning with the word "except" is codified at 43 U.S.C. 662.

APPENDIX B

EXCERPTS FROM THE TWELFTH ANNUAL REPORT OF THE UNITED STATES GEOLOGICAL SURVEY

The Twelfth Annual Report of the United States Geological Survey, 4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 1st Sess. (1890)), provides in relevant part (at 336, 339):

> As the shores, excepting on the west side, are very low and with gentle slope toward the lake, the inclination in places being less that 4 feet to the mile, this variaiton of surfaces increases and diminishes the water area greatly, the shore advancing or retreating over a strip of land 1 to 2 miles or even more in width.
>
> * * * * *
>
> [T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent; for by so doing in years of scarcity, as those of 1888 and 1889, a large proportion of the water which reaches the lake, instead of being lost by evaporation, would be retained and held for use in canals which cover the land of Salt Lake County. On the other hand, considering this question from a theoretical standpoint, if the lake were only one-half its present area, the floods which come in years of exceptional precipitation would cause a far greater proportional increase of water surface than now takes place, for this water, being thrown into a smaller lake and being able to escape but slowly through the Jordan River, would of necessity encroach upon a far greater proportion of the surrounding lands.
>
> Thus, while to obtain the maximum amount of water in years of scarcity it would be better if the lake were small, yet to take care of the floods, which will happen at intervals of from five to ten years,

it is necessary that the lake have a flood area as large as it now has, or even what it would have at the highest water. From consideration of these points the segregation of the land around and under the lake was made to a contour line which should be 5 feet above the low-water mark of 1879.

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No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. RESPONDENTS HAVE STRAYED FROM THE EQUAL FOOTING DOCTRINE 1

A. Respondents Want to Reverse the Presumption of State Title 6

B. The Doctrine's Exception Does Not Apply Here 8

C. Respondents Would Dissolve Their Trust Obligations 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Cited:

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 17, 18

Block v. North Dakota, 461 U.S. 273 (1983) 14, 15

Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935) .. 15, 19

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 12, 13

Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726 (1973) 15

Hardin v. Jordan, 140 U.S. 371 (1891) 12

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) .. 10

Page

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 9

Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150 (1983) 15

Knight v. United Land Ass'n, 142 U.S. 161 (1891) .. 19

Lee Wilson & Co. v. United States, 245 U.S. 24 (1917) 17

Martin v. Waddell, 16 Pet. (41 U.S.) 367 (1842) 16

Massachusetts v. New York, 271 U.S. 65 (1926) 6

Montana v. United States, 450 U.S. 544 (1981) ..*passim*

Nevada v. United States, 463 U.S. 110 (1983) 13

Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 1, 4, 11, 12

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) .. 14

Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212 (1845) 4, 9

St. Paul & Pacific Railroad v. Schurmeier, 7 Wall. (74 U.S.) 272 (1869) 17

Shively v. Bowlby, 152 U.S. 1 (1894) 4, 5, 17, 18

Smelting Co. v. Kemp, 104 U.S. 636 (1881) 15

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 15

Teamsters v. United States, 431 U.S. 324 (1977) 14

Page

United States v. Alaska, 423 F.2d 764 (9th Cir. 1970) 5, 12

United States v. Aranson, 696 F.2d 654 (9th Cir. 1983) 12

United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971) 12

United States v. Holt State Bank, 270 U.S. 49 (1926) 13, 18

United States v. Oregon, 295 U.S. 1 (1935) 6

United States v. Price, 361 U.S. 304 (1960) 14

United States v. Price, 383 U.S. 787 (1966) 16

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) 16

Weber v. Harbor Comm'n, 18 Wall. (85 U.S.) 57 (1873) 12

Western & Southern Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648 (1981) 14

Yankton Sioux Tribe v. South Dakota, 796 F.2d 241 (8th Cir. 1986) 13

Constitution and Statutes Cited:

United States Constitution, art. I 7

United States Constitution, art. IV, §3 3

48 U.S.C. 411 10

25 Stat. 505 (Sundry Appropriations Act of 1888) .....*passim*

Page

26 Stat. 391 ..... 10, 16

28 Stat. 107 (Utah Enabling Act) 11

Miscellaneous Authorities Cited:

19 Cong. Rec. 7014, 7017, 7019, 7021, 7023, 7025-31, 8200, 8471, 8509 and Appendix 496 and 498 (1888) 9, 10

19 Op. Att'y Gen. (1890) 15

Manual of Instructions for the Survey of the Public Lands of the United States, Bureau of Land Management, Bull. 6 (1973) 9, 17

No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

I. RESPONDENTS HAVE STRAYED FROM THE EQUAL FOOTING DOCTRINE.

We submit that the Equal Footing Doctrine could not survive respondents' position. They would make a State's Equal Footing depend on whether the United States deigns to allow it. But Equal Footing is the States' constitutional *entitlement*, and is not a matter of federal beneficence or discretion. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). The Doctrine presumes Utah's title in the lakebed, imposes rigid trust

duties on the United States, and gives respondents the burden of proof regarding the Doctrine's exception.

The principles that must be applied here were settled in *Montana v. United States*, 450 U.S. 544 (1981), and prior Equal Footing cases. Many of those cases arose from a conflict between State title and a federal reservation, and the Court has always concluded that a reservation alone is not enough. Pet. Br. 7, 16-20. Only a specifically expressed *conveyance* to meet a *public exigency* can override State title, and the presumption is always for Equal Footing. *Montana* at 551, 552, 554, 556.

The bed of Utah Lake was not reserved; USGS, acting without authority, merely purported to withdraw it. But even assuming a valid reservation, as respondents do, they still cannot (and have not tried to) distinguish the Utah Lake "reservation" from the reservations in the other cases; and under those cases, Utah must prevail here.

Apparently recognizing the overwhelming burden they have under the settled law, respondents try to unsettle it. They want the Court to revisit and undo the Doctrine's core components. For example, they argue (sometimes subtly, sometimes blatantly) that they, not Utah, have the presumption of ownership; that sovereign lands enjoy no distinction over public lands; that the trust does not limit their discretion; that legislative silence defeats sovereign title; that they do not need a public exigency to defeat State title because any public purpose or federal use will do; that a new exception should be created by which reservations and withdrawals would per se defeat Equal Footing; that even the existing ex-

ception is more important than the Doctrine itself, and should be viewed primarily as an obstacle to State title, not as a restriction on federal action; and that Utah has the burden of proving the Doctrine's exception does not apply.

Those propositions diametrically oppose Equal Footing law. And respondents have necessarily gone outside the Doctrine to support their arguments. For example, they rely first on the Property Clause, which gives the United States "power to dispose of * * * property belonging to the United States." We do not deny that the United States may "dispose of" property that "belongs" to it, but *to whom* the lakebed belongs is the very question to be decided here. The Property Clause cannot answer that question; only Equal Footing law can. (The United States did not *dispose* of the bed of Utah Lake, anyway.) The Property Clause does not override the Equal Footing Doctrine, and respondents' interjection of the Property Clause shows their reluctance to face Equal Footing principles.[1]

They manifest that reluctance also in other ways. For example, they allege they should win this case on the basis of their "supremacy." Resp. Br. 14, 16, 19. But the Supremacy Clause does not defeat Equal Footing. This Court was fully aware of federal supremacy when it decided the Equal Footing cases.

Respondents seem to forget that the States *reserved* ownership of the beds of their navigable waters; that such

[1] Art. IV, §3, also states: "and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

ownership is an Equal Footing right "inherent" in their sovereignty, *Shively v. Bowlby*, 152 U.S. 1, 43 (1894); that "the Constitution itself," not Congress's discretion, assures that right, *Oregon v. Corvallis Sand & Gravel Co., supra*, at 374; that federal "law" (not federal desire) is supreme, and is supreme in a given case only insofar as it is relevant and comports with the Constitution. Of course, the Equal Footing Doctrine is itself federal constitutional law.

Respondents also disregard Equal Footing law by arguing that sovereign lands are "like any other federal lands." Resp. Br. 14. But if sovereign lands enjoy no distinction over public lands, why does the Doctrine so assiduously protect State title in beds of navigable waters, and why does the Doctrine exist at all? Their assertion is untenable; it belies long-standing constitutional law.

Respondents' position would demote sovereign lands and put them into one common, indistinguishable class of "federal land." The United States then would be free to do whatever it wants with "its" lands;[2] and with that established, the United States could hardly lose another Equal Footing case.

[2] The Court has already stated one danger in such federal ownership: "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 230 (1845). Respondents raise this threat by claiming the United States may convey sovereign lands to third parties unhindered by constraints of the public trust doctrine, which does limit State dispositions. Resp. Br. 45-46 n.25.

Respondents clearly want this case decided either outside the Doctrine or under a drastically changed Doctrine. And they could prevail here only on that basis. Besides depriving Utah of ownership, their position would distort and eviscerate fundamental constitutional principles and would impair State sovereignty. Neither fairness to the States nor proper application of the law will permit that.

It is appropriate to note that respondents' basic arguments in this case were also presented to the Court in *Montana*, but to no avail.[3] As we have demonstrated

[3] The United States' brief in Montana v. United States, **supra**, makes the following arguments: "It can no longer be doubted that the United States had the **power** to alienate or reserve to itself for a public purpose the bed and banks of navigable waters that otherwise would pass to the State upon its entry into the Union." **Id.** at 8; same at 12. "If, as we submit, the bed of the River was, prior to statehood, effectively reserved for the Crow Tribe, then the banks were as well. Similarly, if we are wrong, both passed to Montana upon its entry into the Union." **Id.** at 9-10. "We deem it beyond argument that the federal government, acting during the territorial period, could withhold from the future State the beds of navigable waters equally by withdrawing the area and dedicating it to a special public purpose as by alienation to others." **Id.** at 15, **citing** United States v. Alaska, 423 F.2d 764 (9th Cir. 1970). "The rule that federal title to navigable water bottoms inures to the State upon its admission to the Union applies only to the unappropriated lands of the United States. Plainly, it can have no force within an area held in trust for an Indian Tribe to which beneficial ownership is expressly conceded and whose interest is 'property' protected against appropriation or alienation by the Fifth Amendment." **Id. See also id.** at 28, 29.

The United States also relied, as they do here, on Shively v. Bowlby, 152 U.S. 1, 48 (1894), for their notion that no public exigency is necessary. Indeed, they undertook considerable analysis and argument in their attempt to avoid the public exigency requirement. Brief at 12-13. They also unsuccessfully argued that particular rules of construction (different from those required under the Doctrine) should be adopted. **Id.** at 17-18.

(Pet. Br. 34-36), Utah's situation here is even stronger than was Montana's, and since respondents' arguments were rejected in that case, they should fare no better here.

A. *Respondents Want to Reverse the Presumption of State Title.*

It is beyond doubt that, as a matter of Equal Footing law, Utah is *strongly* presumed to own the bed of Utah Lake. *Montana, supra,* at 552, 554; *Massachusetts v. New York,* 271 U.S. 65, 89 (1926). The Constitution presumes State title "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Montana, supra,* at 552, citing *United States v. Oregon,* 295 U.S. 1, 14 (1935).

The presumption pervades the Doctrine, establishes the framework within which Equal Footing cases must be analyzed, and sets the respondents' burden of proof. Under the presumption, State title automatically obtains if respondents fail to prove any part of the Doctrine's exception. And that is a heavy burden indeed. State title recently was upheld even though the sovereign land was part of an Indian reservation that had been *conveyed* to the tribe by specific language, and even though the Court resolves doubts in Indian treaties in favor of the Indians. *Montana;* Pet. Br. 34-36.

Respondents try to invert the law, however. In their argument, the United States presumptively owns the lakebed[4] and Utah has the burden of disproving the elements

[4] Some of respondents' arguments state this position quite explicitly, while others advance it by necessary implication. For example: "* * * Congress has complete ownership of and sovereignty over [sovereign] lands * * *." Resp. Br. 7. Respondents also maintain that the lakebed must belong to them, without debate, by reason of the Property Clause and Article I. **Id.** at 7-8, 13, 44-45. "[T]he United States [has] prior and paramount rights" in sovereign lands. **Id.** at 10. "[W]hen submerged lands are still within a territory, there is no need for the United States to pay compensation in order to appropriate them, because the United States already is the owner." **Id.** at 14. "Congress may simply provide for the submerged lands, like any other federal lands, to be appropriated or reserved * * *." **Id.** at 14-15. "* * * Congress has expressly reserved the [lakebed] in federal ownership." **Id.** at 20, 23.

of the exception.[5] On both counts, just the opposite is true. The presumption of State title would mean nothing if respondents did not have the burden of proving the exception's applicability.

[5] Whereas **Montana** requires respondents to prove a congressional conveyance of the particular sovereign land by clear, especial and specific language and for a public exigency, 450 U.S. at 552, 554, respondents' argument is that Utah has failed to disprove the exception's applicability. For example, "Petitioner has not shown that this expansive language [of the 1888 Act] was understood by anyone to exclude the bed of Utah Lake * * *." Resp. Br. 35. We have indeed shown that the Act's silence could not defeat Utah's title, Pet. Br. 7-8, 14-16, 21-25, but the burden is on respondents in any event.

Respondents also confuse the exception: "A court cannot fashion an exception to such all-inclusive statutory text * * *." Resp. Br. 37. "The absence of any affirmative indication * * * to treat submerged lands differently from all other federal lands therefore undermines * * * petitioner's argument for an implied exception to the broad language of the 1888 Act." **Id.** at 38, 42. But respondents avoid the point and misstate Utah's position. Utah stands on its Equal Footing rights, which arise from the Constitution and do not depend on any statutory provision or exception. It is the United States that must be concerned about proving an exception—the exception to the Doctrine. If respondents wish to prove the Doctrine's exception, they may try. But they should not try to confuse the Doctrine's exception by arguing some supposed statutory exception. And the burden should not shift. The relevant question is whether respondents have proved the exception to the Equal Footing Doctrine.

Respondents try to reverse the burden of proof also as to the public exigency. In response to our showing that there was no public exigency to justify defeating State title, Pet. Br. 7, 9, 31-34, they argue that we have "not shown that Congress exceeded" its authority. Resp. Br. 44.

B. *The Doctrine's Exception Does Not Apply Here.*

As a matter of constitutional principle and precedent, it is truly exceptional when Equal Footing fails and State title is denied. The exception exists for the rare situation where the Government must convey sovereign land to meet an international duty or public exigency. The United States' power to encroach on Equal Footing is limited to that exception, which is deliberately narrow and difficult to establish. The exception is a touchstone for federal conduct, not a hurdle to State title.

Respondents are obviously uncomfortable with the purpose and requirements of the established exception, for they urge a new exception that would fit their case. Their exception would allow them to prevail even though they admittedly did not convey[6] the bed of Utah Lake (unless the withdrawal or reservation counts). Resp. Br. at 7, 17. Their exception would not enforce *Montana*'s requirement of *clear* and *specific* congressional language, and instead would sanction just the opposite, *i.e.*, it would defeat State title because the 1888 Act consists of "expansive language" (*id.* at 35) that *"broadly* provided for the selection of reservoir sites throughout the 'arid region.'" *Id.* at 8 (emphasis added), 34, 35, 38, 42. And their exception to Equal Footing would outright reject the requirement of a public exigency. *Id.* at 9, 44.

Under the established exception, Utah must prevail: The lakebed was never conveyed out of the federal trust; the 1888 Act is broad rather than specific, and does not

[6] Respondents admit the exception requires a congressional conveyance. Resp. Br. 7, 12-13.

even purport to affect (much less convey) sovereign lands; and there was no relevant "public exigency." While respondents have the burden of establishing all parts of the exception, they have established none of them, and even refuse to seriously acknowledge them.

1. The Doctrine's *sine qua non* is the indisputable legal distinction sovereign lands enjoy over lands in the public domain. If that distinction did not exist, there would be no reason for the Doctrine.[7] Pet. Br. 23-25. Inexplicably, respondents claim the distinction is irrelevant and only "supposed." Resp. Br. 35.

They criticize our pointing out that the 1888 Act and its legislative history do not refer in any way to sovereign lands. Resp. Br. 34-37. But that legislative silence is a fact (Pet. Br. 8-15, 21-30; Resp. Br. 34), and the Act therefore cannot defeat State title.

They also complain that we discuss "public lands" even though those words do not appear in the Act. Resp. Br. 35. (They also suggest the legislative history does not contain those words, but that is untrue.[8]) We discuss

[7] The distinction has been recognized and respected from the first. Pollard's Lessee v. Hagan, **supra**, at 221, 223-25 (1845). In Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892), the Court noted that State title in sovereign lands "is a title different in character from that which the United States hold in the public lands which are open to pre-emption and sale."

The "Manual of Instructions for the Survey of the Public Lands of the United States," Bureau of Land Management, Bull. 6 (1973) (hereafter "BLM Manual"), p. 4, states: "Beds of navigable bodies of water are not public domain and are not subject to survey and disposal by the United States. Sovereignty is in the individual states."

[8] The legislative history is full of references to public lands. The pages cited in Pet. Br. 27 n.15 expressly state or otherwise make clear that public lands were Congress's focus. **See also, e.g.,** 19

public lands because they are the Act's only subject. The Act's land-law imperatives, along with its silence about sovereign lands, show that Congress's intentions and expressions went only to publi[c] lands.[9] Pet. Br. 21-30.

Respondents rely on *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), for the immaterial proposition that under "regular" rules of construction a statutory reference to "public lands" does not necessarily exclude tide lands. Resp. Br. 35-36. But *Hynes* was a Property Clause case, 337 U.S. at 103-04, not an Equal Footing case, and therefore did not employ the Doctrine's special rules of construction that necessarily flow from the presumption of State title. *See Montana*, 450 U.S. at 552, 554; Pet. Br. 12-16, 35. Moreover, it was expressly given that nothing in the legislation could "impair[] in any degree the [State's] title" in sovereign lands. *Hynes*, 337 U.S. at 102-03, *quoting* the Act of May 14, 1898, 48 U.S.C. §411. And the particular legislation was to benefit the Alaskan Indians, and it was construed accordingly.[10] *Id.* at 110-11.

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[8] **Continued**
Cong. Rec. 7014, 7017, 7019, 7021, 7023, 7025-31, 8200, 8471, 8509, and Appendix 496 and 498 (1888). The 1890 Act also shows that the 1888 Act had pertained only to "public lands." 26 Stat. 391; Pet. Br. 29 n.16.

[9] Even if it showed only that Congress had not focused on Utah Lake and other sovereign lands, Utah's title would be safe under the **Montana** requirement of clear and especial words conveying specific sovereign lands.

[10] Contrary to respondents' suggestion, the distinction sovereign lands enjoy does not depend on the cases they refer to (Resp. Br. 36 n.20). See the cases we cite **ante** at n.7. But those cases do support our position. **Hynes** did not discredit those cases; they are still good law and represent sound principles. Nothing in **Hynes** militates against Utah's title in this case.

Respondents' remarkable difficulty in distinguishing between classes of land extends also to school lands. They try to counter the Utah Enabling Act's assurance of Equal Footing (Pet. Br. 37 & n. 21) by invoking an irrelevant provision about school lands (Resp. Br. 18-19), which are statutory grants expressly subject to prior federal reservations. Equal Footing lands, in contrast, are reserved by the States, are not part of the public domain in any sense that would make them subject to entry under the land laws, cannot be retained by federal reservation, and are not congressional grants at all. *Corvallis Sand & Gravel, supra*, 429 U.S. at 374.

2. Respondents' arguments are further vitiated by their dependence on the Property Clause, which has no relevance. To assert the Property Clause is to presuppose ultimate federal ownership of the lakebed, which presupposition would obviate and negate the Doctrine and its presumption.

They argue that State sovereign title must defer to the United States' powers under the Property Clause (which they allege empowers them to "dispose of" or "acquire" sovereign lands by "appropriation or reservation").[11] Resp. Br. 16. But, unequivocally, sovereign lands were not subordinated to the Property Clause. "The State's power over the beds of navigable waters re-

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[11] Respondents' argument that to withdraw or reserve sovereign lands is to "dispose of" or "appropriate" them is, first, immaterial (because a **conveyance** is required, regardless of how "dispose" or "appropriate" might be defined) and, second, it is unsupported. None of respondents' cases shows that a reservation constitutes a conveyance, disposal or appropriation that could satisfy Equal Footing requirements.

mains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935). *Accord: Weber v. Harbor Comm'n*, 18 Wall. (85 U.S.) 57, 66 (1873); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891).

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), made clear that the United States' power to dispose of sovereign lands means only that it can convey them. The *Choctaw* reference to "dispose of," which respondents quote so often (Resp. Br. 12, 16, 37), is followed immediately by this clarification: "Rather, the question is whether the United States intended to convey title to the river bed * * *." 397 U.S. at 633. An administrative withdrawal or a statutory reservation is not a conveyance to a third party, and since title remained in the federal trust until statehood, title then passed to the State.

3. The Court's precedents show that a reservation or withdrawal alone cannot defeat Equal Footing. *See* Pet. Br. 7, 16-21, 34-38. The United States' arguments on reservations were briefed but rejected in *Montana* (*see ante* at 5 & n.3) and they have presented no reason to undo the long line of precedents.[12]

[12] Respondents cite (at p. 19) two Ninth Circuit opinions, United States v. Alaska, 423 F.2d 764, **cert. den.** 400 U.S. 967 (1970) and United States v. City of Anchorage, 437 F.2d 1081 (1971), for the proposition that a reservation may defeat State title. But those cases do not square with **Montana** or the other Equal Footing cases, and the Ninth Circuit itself has improved its analysis since **Montana**; **see** United States v. Aranson, 696 F.2d 654 (9th Cir. 1983). The Eighth Circuit clearly does not follow the Ninth Circuit's pre-**Montana** in-

The sum of respondents' case is that Congress intended to reserve sovereign lands. We emphatically deny that, for the 1888 Act shows an intention to reserve only lands subject to public entry or appropriation under the land laws. Pet. Br. 21-30. But even assuming Congress had intended to reserve sovereign lands, that would not be enough to defeat State title. Congress's reservations in *Montana*, *Holt State Bank*, 270 U.S. 49 (1926), *Choctaw*, and others,[13] were far more focused and were directed at far more specific lands than here. Yet, State title

[12] **Continued**
clination to favor reservations over State title. Yankton Sioux Tribe v. South Dakota, 796 F.2d 241, 244 (8th Cir. 1986): "The only recognized exception to the * * * [D]octrine is a congressional conveyance of the [sovereign land]."

[13] The United States unsuccessfully made comparable arguments about reservations in Nevada v. United States, 463 U.S. 110 (1983), which, although not an Equal Footing case, is instructive. The dispute involved water rights held by the United States for the benefit of both an Indian reservation and a federal reclamation project. The suit on their behalf by the United States against other water users was eventually settled. The United States later wanted to relitigate to get more water for the reservation, and the issue was whether res judicata prevented the new action.

The Government claimed additional water to meet a "necessary" purpose of the reservation, arguing that the executive order creating the reservation must have impliedly reserved a right for the water. **Id.** at 119. The Government's argument essentially was that it "owned" the water in some sort of trust for the project and the reservation, and that the Government therefore could, at any time, reallocate its water between its beneficiaries as it thought proper. **Id.** at 121, 126.

The Court rejected that proposition, holding that "the Government's 'ownership' of the water rights was at most nominal," and that the real ownership or beneficial interest was in those for whom the Government had held the rights in trust. **Id.** at 126.

Nevada shows that valid property rights need not yield to a conflicting, pre-existing federal reservation. The Court's comment in **Nevada** is apropos: "We are bound to say that the Government's position, if accepted, would do away with half a century [here, 140 years] of decided case law * * *." **Id.** at 121.

could not be defeated in those cases without a third-party conveyance.

4. Respondents' arguments about the 1888 Act and the later legislation depend on inferences[14] and a statutory construction foreign to the Doctrine. They cite numerous cases (Resp. Br. 19, 26-27, 31) that had nothing at all to do with Equal Footing, and which consequently had no occasion to apply the construction favorable to State title that the Doctrine's presumption necessitates.[15] *Montana*, 450 U.S. at 552, 554.

The one case that mentions Equal Footing, *Block v. North Dakota*, 461 U.S. 273 (1983), did not defeat State title under the Doctrine, contrary to respondents' suggestion (Resp. Br. 37). Rather, it held the Government immune from suit because of a limitations provision. *Block* at 288-89. In fact, "[t]he title dispute remains unresolved." "If the river is navigable, the land in

[14] **Montana** requires clear and especial congressional expression, not inferences, to defeat State title. Yet, respondents and the Tenth Circuit have reached far beyond the 1888 Act, which they argue was the authority for the withdrawal. They rely largely on subsequent legislative history and on "other [post-withdrawal] agency documents." Pet. App. 11a. But those sorts of derivative inferences do not satisfy constitutional requirements. And as the Court has admonished, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). "It is the intent of the Congress that enacted [the Act] * * * that controls." Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979), **quoting** Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

[15] Respondents' cases run a wide gamut of irrelevancy, from retaliatory taxation under the Equal Protection Clause, Western & Southern Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 671-72 (1981), to felonious conspiracy to violate civil rights, United States v. Price, 333 U.S. 787 (1966). They do not enlighten this case because they do not address the sort of construction the Doctrine's presumption makes necessary.

question belongs to North Dakota * * * regardless of whether" the State's suit was time-barred. *Id.* at 291 & n.27.

Respondents also cite *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150 (1983), which supports Utah's position, considering respondents' only hope here is to prove the Doctrine's exception. The 1888 Act expressed nothing about sovereign lands or a conveyance, and in *Jefferson* the lack of necessary expression precluded the desired exception. *Id.* at 162, 166. Both the Act and its "legislative history fall[] far short of supporting respondents' contention [for] an [exception] * * *." *Id.* at 159.

Respondents' various devices for construing the 1888 Act are not appropriate in this case and do not overcome Utah's title.[16] Given the 1888 Act's silence about sov-

[16] There are at least three problems with respondents' asserted administrative construction of the 1888 Act. First, USGS's purported construction was wholly self-serving. This is not a situation in which an agency's construction simply benefits one third party over another. Rather, USGS's construction here was a self-benefiting arrogation of authority, which led to the attempt to keep sovereign lands for the United States. Second, the record shows that over time the United States has been inconsistent about who owns the lakebed, while Utah has consistently exercised its ownership, use and control of the Lake. R. vol. IV, tabs A-K. Third, to say that USGS withdrew Utah Lake is not to say that the agency actually had authority, and if not authorized, the withdrawal is "inoperative and void, no matter with what seeming regularity the forms of law [USGS] may have * * * observed." Borax, Ltd. v. Los Angeles, 296 U.S. 10, 18 (1935), quoting Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881). An agency cannot create authority for itself, Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 745 (1973), and cannot exercise authority it has not been given. Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979). In addition, the Attorney General's opinion respondents refer to, 19 Op. Att'y. Gen. 564 (1890), supports what we have said all along: The 1888 Act's purpose was to prevent entry and settlement of public lands under the land laws.

ereign lands and conveyances, "[t]he plain language of the statute itself * * * is sufficient to resolve the question presented." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984). "[I]f we are to give [the Equal Footing Doctrine] the scope that its origins dictate, we must accord it a sweep as broad as its language. We are not at liberty to seek ingenious analytical instruments" to avoid the Doctrine. *United States v. Price*, 383 U.S. 787, 801 (1966). If Congress had wanted to defeat State title, that intention "would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 416 (1842).

5. Respondents acknowledge Utah's argument that the 1888 Act's purpose was to prevent monopoly and speculation under the land laws. Resp. Br. 38. (The Act therefore could not have meant to allow the bed of Utah Lake to be withdrawn. Pet. Br. 21-30.) But respondents contend the withdrawal was appropriate because USGS had considered both raising and lowering the Lake's water level.[17] Lowering it, they argue, would have exposed the bed to entry "through abuse of the general land laws that Congress sought to prevent." Resp. Br. 39. Their position is not correct.

Any attempted or purported entry or appropriation

[17] Respondents admit that in 1888 Congress did not legislate to have the United States develop irrigation sites itself. That intention arose years later with the Reclamation Act of 1902. Resp. Br. 40. Respondents nevertheless cite 1890 legislative history to support their view of the 1890 Act as a declaration of "the Nation's irrigation policy" (Resp. Br. 30-31 & n.17), all of which is irrelevant to whether the purported withdrawal of Utah Lake was valid under the 1888 Act.

of the lakebed would have been void as a matter of constitutional law, for title is held for the State until statehood. Even assuming sovereign lands could *ever* be subject to the land laws, by 1878 the bed of Utah Lake was not. The United States' survey of Utah Lake began in 1856 and concluded in 1878 (except for 3 small segments, totalling 10 miles, completed in 1910), resulting in the surveyed meander line (R. vol. IV, tab F), which "segregated" the navigable water and its bed from the public domain.[18] The 1888 Act could have had no purpose as to the bed of Utah Lake.

6. Respondents vainly argue against the public exigency requirement. Resp. Br. 9-10, 44-50. They note (*id.* at 46) that *Montana* requires the conveyance to be for a public exigency, 450 U.S. at 552, 556, but they deny it nevertheless. Under their theory, virtually any public purpose or federal use would override State title. They rely on *Shively v. Bowlby* and various cases unrelated to Equal Footing.[19] But *Montana* clearly shows

[18] The BLM Manual (see ante n.7), p. 93, states: "All navigable bodies of water * * * are segregated from the public lands at mean high-water elevation. In original surveys, meander lines are run for the purpose of ascertaining the quantity of land remaining after segregation of the water area." See also id. at 175; Lee Wilson & Co. v. United States, 245 U.S. 24, 27 (1917); St. Paul & Pacific Railroad v. Schurmeier, 7 Wall. (74 U.S.) 272, 286-87 (1869).

[19] See Resp. Br. 9-10, 44, 47-49, where they argue that any "public use" or "proper" public purpose suffices. They rely on Property Clause cases, eminent domain cases, and cases under the Necessary and Proper Clause in their attempt to overturn a fundamental, long-standing feature of Equal Footing law.

Montana clearly states that while a reservation as in Alaska Pacific Fisheries v. U.S., 248 U.S. 78 (1918), may be an appropriate public purpose, a public exigency is required to defeat State title. 450 U.S. at 556. (Note that Alaska Pacific Fisheries was not an Equal Footing case; it involved a statute that, compared to the

that an "appropriate public purpose," as that phrase is used in *Shively*, must rise to the level of a public exigency before it can defeat State title. 450 U.S. at 552, 556; Pet. Br. 31-34. The fallacy of their theory is evident. If a simple public purpose or federal use could defeat Equal Footing, the federal reservations (which by nature are public purposes or uses) in such cases as *Montana* and *Holt State Bank* would themselves have defeated State title.

There was no public exigency here, nor even an "appropriate public purpose." Pet. Br. 33-34; Petition for Writ of Cert. 16; Reply Br. on Pet. for Writ of Cert. 5. Utah's title therefore must prevail regardless of whether Congress statutorily reserved the lakebed (and we emphatically deny any such congressional intent). Respondents argue (Resp. Br. 44) that Utah's position necessarily implies the 1888 Act is unconstitutional. Not necessarily so.

Without doubt, any legislation would be unconstitutional if its purpose were to defeat Equal Footing title where no international duty or public exigency existed. But the 1888 Act's constitutionality need not be reached here. Since there was no public exigency in this case, and the legislation on its face did not purport, in clear and specific terms or otherwise, to convey Utah Lake and other sovereign lands, State title prevails without

[19] **Continued**
1888 Act, was very specific, 248 U.S. at 86-87, and it applied the "rule that statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." **Id.** at 89.)

further inquiry. In fact, any question of unconstitutionality arises only as a result of respondents' improper application (now and in 1889) of the Act.

C. *Respondents Would Dissolve Their Trust Obligations.*

1. The United States holds sovereign lands "only in trust for the future States." *Borax, Ltd., supra,* at 15, citing *Knight v. United Land Ass'n,* 142 U.S. 161, 183 (1891); Pet. Br. 13. Respondents acknowledge the trust but argue that it does not limit their discretion. Resp. Br. 11, 13. In particular, they allege to hold sovereign lands in trust also for "the Nation as a whole" under the Property Clause, which, they say, gives them "plenary power" and "full authority" to do with sovereign lands anything they think "appropriate." *Id.* at 13.

The United States does *not* hold sovereign lands in trust for itself. Rather, it holds sovereign lands in trust for the States under the Equal Footing Doctrine, irrespective of the Property Clause. There is no precedent for respondents' position, which they advance for the apparent purpose of negating the Equal Footing trust. For the "trust" they want would give the trustee plenary discretion, with no obligations to the beneficiary; and that would be no trust at all.

2. We submit that if Utah's constitutional entitlement depends on whether or not the United States will allow it, then the States do not have much right at all. Utah and the 33 *amici* States urge the Court not to adopt respondents' proposed changes in the Equal Footing Doctrine, which goes to the heart of State sovereignty and

federalism. Equal Footing of the States should not be depreciated, and certainly not for the sake of a federal withdrawal that was not authorized and never necessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court
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OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its
DIVISION OF STATE LANDS,
Petitioner,

VS.

UNITED STATES OF AMERICA; DONALD P. HODEL,
Secretary of the Interior;
ROBERT F. BURFORD, Director of the Bureau
of Land Management within the
Department of the Interior; and
ROLAND G. ROBISON, JR., Utah State Director
of the Bureau of Land Management,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

BRIEF OF THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a pre-statehood federal withdrawal and reservation can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A Pre-Statehood Federal Withdrawal and Reservation Cannot Defeat a State's Sovereign Ownership of Lands Underlying Navigable Waters Under The Equal Footing Doctrine	4
CONCLUSION	16

TABLE OF AUTHORITIES CITED

Cases

	Page
Alaska v. United States, Nos. A 83-343, A 84-485 and A 86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986)	11
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)	8
Arenas v. United States, 332 U.S. 419 (1944)	7
Arizona v. California, 373 U.S. 546 (1963)	5, 13
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	1, 6, 7, 8, 10
Coyle v. Smith, 221 U.S. 559 (1911)	14, 15, 16
Escanaba Co. v. Chicago, 107 U.S. (17 Otto) 678 (1883)	13, 14
Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1949)	7
Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1982)	12
Kaiser Aetna v. United States, 440 U.S. 164 (1979)	8
Knight v. United Land Association, 142 U.S. 161 (1891)	1
Mann v. Tacoma Land Co., 153 U.S. 273 (1894)	8
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)	4
Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) *cert. denied,* 455 U.S. 1007 (1982)	12, 13
Montana v. United States, 450 U.S. 544 (1981)	1, 6
Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867)	5
Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	2, 5
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)	5, 12, 14, 15
Shively v. Bowlby, 152 U.S. 1 (1894)	5, 12
United States v. California, 342 U.S. 19 (1947)	9
United States v. California, 436 U.S. 32 (1978)	7, 9, 10
United States v. Holt State Bank, 270 U.S. 49 (1926)	6
United States v. Louisiana, 363 U.S. 1 (1960)	5, 9

TABLE OF AUTHORITIES CITED

CASES

	Page
United States v. Oregon, 295 U.S. 1 (1935)	5, 12
United States v. Sandoval, 231 U.S. 28 (1913)	15
United States v. Utah, 283 U.S. 64 (1930)	7, 8

Other Authorities

Public Land Law Review Commission, *One-Third of the Nation's Land* (1970)	2
Sol. Op. M-36911, 86 I.D. 151 (1978)	10
Sol. Op. 36949, 91 I.D. 67 (1983)	11
Submerged Lands Act, 43 U.S.C. §§ 1301, *et seq*	9
The Status of Federalism in America[:] A Report of the Working Group on Federalism of the Domestic Policy Council (November 1986)	3
E.C. Baynard III, Public Land Law and Procedure (1986)	2

No. 85-1772

In the Supreme Court

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OCTOBER TERM, 1986

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INTEREST OF AMICI CURIAE

For more than 140 years, this Court consistently has held that title to lands underlying navigable rivers and lakes is an incident of sovereignty reserved to the several states, subject only to the powers surrendered to the national government in the Constitution. This sovereign ownership vested in the original thirteen states as direct successors to the English crown, and was retained by them when they formed the Union. Because the Constitution requires that all states are equal with respect to sovereignty, the United States holds such lands in territories in trust for future states, and title passes from the federal government to new states when they join the Union and assume sovereignty on an "equal footing" with previously-admitted states.[1]

The only exception to this equal footing doctrine which this Court has permitted is the very rare situation where the United States conveyed title to lands underlying navigable waters to a third party prior to statehood.[2] In this case, the Court of Appeals for the Tenth Circuit created a new exception, holding that the pre-statehood federal designation of Utah Lake as a potential reservoir site, as distinct from a pre-statehood conveyance to a third party, defeated Utah's sovereign title to the lakebed under the constitutional equal footing doctrine.

There are many navigable rivers and lakes within the boundaries of several of the states appearing as *amici curiae*. A number of these navigable waterbodies lie within the exterior boundaries

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[1] *See generally Montana v. United States*, 450 U.S. 544, 551-552 (1981), and cases cited.

[2] The only time this Court has found such a conveyance was *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), characterized in *Montana* as "a singular exception" to the otherwise "established line of cases," 450 U.S. at 555 n.5, holding that title to submerged lands vests in the states at statehood. To be distinguished are cases in which this Court has recognized the validity of grants by foreign governments prior to the United States acquiring the territory. *See e.g., Knight v. United Land Association*, 142 U.S. 161 (1891) (pre-territorial Mexican grant).

of pre-statehood federal withdrawals and reservations[3] similar to the pre-statehood federal designation of Utah Lake as a potential reservoir site. Accordingly, and in light of the generally recognized excessive use of federal withdrawal authority,[4] a number of the *amici* states have a direct proprietary interest in the outcome of this case.

But the issue here goes well beyond a mere question of title: "Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). The specific issue presented in this case—the effect of a pre-statehood federal withdrawal and reservation on a state's

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[3] The terms "withdrawal" and "reservation," although commonly used together, denote distinct concepts. A "withdrawal" of public lands removes them from settlement, sale, or entry under some or all of the public land laws. *See* E. C. Baynard III, Public Land Law and Procedure, § 5.1 at 148-151 (1986). A "reservation" reserves the lands for some particular use, purpose or program. *Id.*, § 5.36 at 179.

[4] The Public Land Law Review Commission stated:

> Concern about problems associated with the "withdrawal" and "reservation" of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. *The contractor's study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.*
>
> . . .
>
> . . . *In short, the excessive use of Executive withdrawals has become a source of increasing controversy.*

Public Land Review Commission, *One Third of the Nation's Land* (1970) at 43-44 (footnote omitted; emphasis added). As just one example, "95 million acres—more than one-fourth of the total area of Alaska—[was] enclosed within various Federal withdrawals and reservations" at the time Alaska was admitted to the Union. H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). This federal practice, widespread throughout many of the more recently admitted states, had "been carried to extreme lengths" in Alaska such that many withdrawals were "either excessive in size or totally unnecessary." *Id.* at 6-7.

sovereign title under the equal footing doctrine—has significant implications beyond those respecting sovereign state title to lands underlying navigable waters. This case may be viewed as but one example of an increasing federal encroachment on state sovereignty,[5] and presents a basic question concerning the relationship between the inherent sovereignty of the several states and the powers surrendered to the national government in the Constitution. As such, it is of vital importance to all *amici* states.

SUMMARY OF ARGUMENT

Ownership of the beds of navigable waterbodies is an inherent attribute of state sovereignty under the equal footing doctrine. The only exception to this doctrine is the very rare circumstance where the United States has conveyed title to lands underlying navigable waters to a third party prior to statehood.

This Court has never held that a federal withdrawal and reservation of lands underlying navigable waters—as distinguished from a conveyance to a third party—defeats a state's sovereign title under the equal footing doctrine. Indeed, this Court has recognized that a federal withdrawal and reservation, even if it includes submerged lands, is not a conveyance and has no effect on title to the lands.

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[5] Even the federal executive's Working Group on Federalism, chaired by the head of the Office of Legal Counsel in the Department of Justice, has recognized this gradual change in the relationship between the national government and the states. *See The Status of Federalism in America*[:] *A Report of the Working Group on Federalism of the Domestic Policy Council* (November 1986). *Amici* states find it ironic that the United States, while decrying " . . . the erosion of federalism in this country [and t]he nationalization of state sovereignty," *id.* at 2, simultaneously seeks in this case to nationalize state sovereign submerged lands by arguing that limited pre-statehood federal action—designation of Utah Lake as a potential reservoir site, a purpose for which it has never been used—totally defeated Utah's sovereign title under the constitutional equal footing doctrine. Proprietary interests, it would seem, take precedence over principle.

The correct analysis is that title to the lands vests in the states at statehood under the constitutional equal footing doctrine, subject only to those powers surrendered to the national government in the Constitution. Where it is asserted that pre-statehood federal action, not amounting to a conveyance, somehow affects a new state's sovereign title, the proper test is whether that federal action, if it had been taken after the new state's admission, would validly supersede sovereign state rights. This is the same test this Court prescribed for determining the validity of conditions imposed by Congress under its article IV, section 2, clause 1 power to admit new states into the Union.

Under this test, a post-statehood designation of Utah Lake as a potential reservoir site would have had no effect on the automatic transfer of sovereign title to Utah upon its admission. Congress could not have conditioned Utah's admission to the Union on a pre-statehood federal designation having that effect, and the pre-statehood federal designation, standing alone, cannot be given an effect which Congress could not achieve under its express constitutional power to admit new states.

The decision below is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine, and must be reversed.

ARGUMENT

A PRE-STATEHOOD FEDERAL WITHDRAWAL AND RESERVATION CANNOT DEFEAT A STATE'S SOVEREIGN OWNERSHIP OF LANDS UNDERLYING NAVIGABLE WATERS UNDER THE EQUAL FOOTING DOCTRINE

This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty. The original thirteen states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). All subsequently admitted states enter the Union on an equal footing with the original thirteen states, and accordingly must hold the same title to the lands underlying

navigable waters within their respective boundaries. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Under this equal footing doctrine, "the states since admitted have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867).

To implement the equal footing doctrine of *Pollard's Lessee*, the United States holds such lands in a territory "in trust for the several States to be ultimately created out of the territory." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Indeed, a new state's sovereign ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it on admission." *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citation omitted).

The transfer of title from the United States, as trustee for the new state, to the new state is automatic, *Arizona v. California*, 373 U.S. 546, 597 (1963), and is a matter of constitutional law, not federal grace:

> Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is confirmed not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.

Corvallis Sand & Gravel, 429 U.S. at 374.

At the same time, this Court has recognized that the automatic transfer to the State of title to lands underlying navigable waters cannot occur where the United States has conveyed them to a third party prior to statehood. In that event, there is no title in the

United States to which the state can succeed. However, such conveyances will be found only in extraordinary circumstances:

> Because control of the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations and footnote omitted). Such pre-statehood conveyances are so rare that *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that the bed of the Arkansas River was conveyed to three Indian tribes prior to Oklahoma's admission to the Union and therefore Oklahoma's title to the bed was defeated, is "a singular exception" to the otherwise "established line of cases" holding that title to submerged lands vests in the states at statehood. *Montana*, 450 U.S. at 555 n.5.

Here, of course, it is not even suggested that there was a conveyance of submerged lands; instead, it is urged that a pre-statehood withdrawal and reservation has the same effect a conveyance would have had on sovereign state title. This Court has never held, or even intimated, that a federal withdrawal and reservation of submerged lands underlying navigable waters—as opposed to a conveyance to a third party—will defeat a state's title under the equal footing doctrine.[6] Nonetheless, while ac-

[6] Even where the United States has granted third party rights to submerged lands prior to statehood, a new state's title is not necessarily defeated. Instead, a new state's rights "are restricted or qualified accordingly." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). In other words, while a pre-statehood fee simple conveyance may defeat a new state's title, the pre-statehood creation of a lesser third party interest results in a new state taking title, subject at most to a valid existing right.

knowledging that this Court has referred only to pre-statehood conveyances as having that possible effect, the lower court concluded that "the same principles also apply to pre-statehood reservations or withdrawals by the United States." 780 F.2d at 1518 (Petitioner's Appendix at 8a-9a; citations omitted).

Amici states agree with the lower court that the principle of construction applicable to an asserted pre-statehood federal conveyance—*i.e.*, that the bed of a navigable waterbody is not conveyed unless the intention to do so is made clear and plain—also applies when determining whether submerged lands were intended to be included within a pre-statehood federal withdrawal and reservation. *See* 780 Fed.2d at 1518-1519 (Petitioner's Appendix at 9a). However, that does not address the real issue presented here.

The real issue is whether a pre-statehood federal withdrawal and reservation, assuming it included the bed of a navigable waterbody, has the same effect on a new state's sovereign title that a pre-statehood conveyance would have. It does not. In several cases, this Court has been careful to recognize that a federal withdrawal and reservation, even if it included submerged lands is not a conveyance.[7] and does not affect title to the lands. *See, e.g., United States v. California*, 436 U.S. 32, 40-41 (1978) (a federal withdrawal and reservation for a national monument "thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another" and "did not and could not enhance the strength of the Government's basic claim to a property interest in the submerged lands") (footnote omitted); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) (an executive withdrawal for Indians was merely a reservation " 'for a particular governmental use,' not a disposal of the area") and 115-116 (temporary use, not final disposition, was at issue); *United States v. Utah*, 283 U.S. 64, 88

[7] A "conveyance" includes the passage of title by patent, *Arenas v. United States*, 332 U.S. 419, 421-422 (1944), and the vesting of equitable title in third parties, as in *Choctaw Nation*.

(1930) (a pre-statehood federal withdrawal and reservation "did not constitute a grant"); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88 (1918) (a reservation for the benefit of Indians "was not in the nature of a private grant").

The distinction between a pre-statehood conveyance of submerged lands by the United States to a third party and a pre-statehood federal withdrawal and reservation is a substantive one. In the rare circumstances where the United States has validly conveyed submerged lands to a third party prior to statehood, as in *Choctaw Nation*, sovereignty and ownership have been severed. Following such a conveyance, the entire "bundle of rights that are commonly characterized as property"[8] has been transferred to a third party. No attributes or aspects of ownership remain linked to sovereignty, and none of those rights remain to be transferred to the new state.

In the case of a pre-statehood federal withdrawal and reservation, however, the United States has not conveyed the lands to a third party. Instead, such action merely withdraws them from the operation of the public land laws and reserves them for some limited specific purpose.

A pre-statehood federal withdrawal of lands, as distinct from a reservation,[9] can have no material effect on submerged lands underlying navigable waters. A withdrawal merely removes lands from the general public land laws relating to settlement, entry, location and sale. Submerged lands underlying navigable waters are reserved to future states under the constitutional equal footing doctrine; Congress has never made them subject to disposal under the general land laws. *Mann v. Tacoma Land Co.*, 153 U.S. 273, 283-284 (1894).

A pre-statehood federal reservation reserves the lands for some limited specific purpose. Regardless of the purpose of the limited reservation, however, since the lands are still in federal ownership and necessarily remain subject to the pre-existing constitutional

[8] *Kaiser Aetna v. United States*, 440 U.S. 164, 176 (1979).

[9] *See* n.3 *supra*.

reservation of submerged lands under which the United States holds the lands in trust for future states.

This Court addressed the effect of a federal withdrawal and reservation of submerged lands on a state's title to those lands in *United States v. California*, 436 U.S. 32 (1978). The submerged lands at issue in that case constituted a part of the territorial sea and therefore were not subject to the constitutional equal footing doctrine, *see United States v. California*, 342 U.S. 19 (1947), even though such lands were "assumed by many, and not without reason," to fall within the doctrine. *United States v. Louisiana*, 363 U.S. 1, 16 (1960). In response to the 1947 *California* decision, Congress passed the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.* "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*, 332 U.S. 19," 436 U.S. at 37, and extend the principles of the equal footing doctrine to the submerged lands underlying the territorial sea. *Louisiana*, 363 U.S. at 16-24.

The 1978 *California* case centered on a 1949 Presidential Proclamation which enlarged the Channel Islands National Monument to include a one-mile belt of submerged lands surrounding Anacapa and Santa Barbara Islands offshore California. That federal withdrawal and reservation of submerged lands pre-dated the Submerged Lands Act, and the United States contended that the lands therefore were excepted from conveyance to California under the Act. However, this Court held that a pre-Submerged Lands Act federal withdrawal and reservation (like the 1889 designation of Utah Lake as a potential reservoir site) was only a change in federal use and management of the lands and did not strengthen any federal proprietary interest. *Id.* at 40-41. Accordingly, a federal withdrawal and reservation cannot defeat a state's title under that Act.[10]

If a pre-Submerged Lands Act withdrawal and reservation has no effect on a state's *statutory* title, which is, after all, merely a matter of Congressional grace, *a fortiori* a pre-statehood with-

[10] Notwithstanding Utah's right under the constitutional equal footing doctrine, it independently is entitled to the bed of Utah Lake under the Submerged Lands Act as construed in *California*.

drawal and reservation cannot defeat a state's *constitutional* sovereign title under the equal footing doctrine. Even when they are withdrawn and reserved for a specific purpose, the federal government's title to submerged lands underlying navigable waters is not enhanced. *California*, 436 U.S. at 40-41. On the other hand, as a matter of constitutional law, "the title thus acquired by the State is *absolute* so far as any federal principle of land titles is concerned." *Corvallis Sand & Gravel*, 429 U.S. at 374 (emphasis added).

The United States, however, takes the position that a pre-statehood federal withdrawal and reservation, for a limited purpose and frequently for a limited time, has the much more significant effect of defeating a state's constitutional equal footing rights for all purposes and all time. In this case, it argues that the pre-statehood designation of Utah Lake as a potential reservoir site (a purpose for which it has never been used) defeated Utah's sovereign title and therefore the United States, not Utah, now is free to lease the lakebed for the wholly unrelated purpose of oil and gas exploration.[11]

This is not the first time the federal government has taken this position. An even more egregious example appears in Sol. Op. M-36911, 86 I.D. 151 (1978). In 1943, Acting Secretary of Interior Abe Fortas issued Public Land Order No. 82 ("PLO 82") which, among other things, withdrew 48.8 million acres, constituting all of Alaska's North Slope, and reserved the minerals therein "for use in connection with the prosecution of [World War II]." Although the war ended in 1945, PLO 82 was not revoked until 1960, shortly after Alaska was admitted to the Union in 1959. Notwithstanding that (1) PLO 82 only reserved minerals, (2) the purpose of that limited reservation expired with the end of the war in 1945, and (3) it was revoked entirely in 1960, the Solicitor of

[11] "The controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of Interior began to issue oil and gas leases on the bed of Utah Lake—an Act that the state viewed as a violation of its ownership and property rights to the bed of Utah Lake." 780 F.2d at 1516 (Petitioner's Appendix at 2a) (footnote omitted).

Interior in 1978 concluded that it nonetheless totally defeated Alaska's sovereign title to all submerged lands underlying navigable waters in the entire 48.8 million acre area.[12]

In this bootstrap manner, the federal government is systematically seeking to transform narrow pre-statehood federal actions having no effect on title—in this case, a never-implemented designation of a potential reservoir site; in the case of PLO 82, a temporary, now revoked reservation of only the minerals for use in a war which ended fourteen years before statehood—into permanent federal retention of the entire fee. Such over-reaching is not necessary to any legitimate federal interest. What is worse, it can come only at the expense of the states' sovereign rights under the constitutional equal footing doctrine, and would fundamentally alter the relationship between the states and the United States.

This Court has recognized that federal ownership of lands underlying navigable waters, as now claimed by the United States, poses a serious threat to state sovereignty while state ownership poses no threat to federal interests:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the

[12] Apparently recognizing the potentially devastating effect of this opinion on Alaska and its oil company lessees in the Prudhoe Bay area, the Solicitor concluded in 1983 that, while (in his opinion) PLO 82 defeated Alaska's sovereign title, the state could gain title to submerged lands underlying navigable waters by selecting them under the Alaska Statehood Act. *See* Sol. Op. 36949, 91 I.D. 67 (1983). The Bureau of Land Management has subsequently confirmed Alaska's title under this attentuated approach. The United States continues to press its argument against sovereign state title, however, with respect to submerged lands in the National Petroleum Reserve-Alaska in *Alaska v. United States*, Nos. A83-343, A84-485 and A86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986, respectively).

> exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For [state sovereignty is] but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

Pollard's Lessee, 44 U.S. at 230.

The "injury" that state sovereignty might suffer from the wielding of this "weapon" by the United States goes well beyond a mere infringement of a proprietary interest. A state's sovereign title to the lands underlying navigable waters is much more than a simple property right:

> [I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 452 (1982). The lower court failed to acknowledge these fundamental principles and the analytic approach which they require.

The proper analysis, one which harmonizes a state's constitutional right to be admitted to the Union on an equal footing and the federal government's ability to discharge its constitutional duties, is that title to the lands vests in the states at statehood, subject only to those powers surrendered to the national government in the Constitution.[13] *Shively*, 152 U.S. at 57-58. Under this

[13] The most obvious example of these is "the paramount power of the United States to control such water for purposes of navigation in interstate and foreign commerce" under the Commerce Clause, article I, section 8, clause 3. *United States v. Oregon*, 295 U.S. at 14. While *amici* states do not necessarily agree, one lower court has found that these powers also include the power to regulate the use of state-owned submerged lands and waters to protect federal property interests under the Property Clause, article IV, section 3, clause 2. *See Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied* 455 U.S. 1007 (1982) (under the Property Clause, the United States can regulate the use of state-owned submerged lands and waters in the Boundary Waters Canoe Area).

approach, transfer of sovereign title to a new state and the federal government's ability to discharge its national responsibilities are not incompatible, as the lower court apparently assumed. The federal government's exercise of the powers surrendered to it in the Constitution simply does not depend on federal ownership of the beds of navigable waters. *See, e.g., Arizona v. California*, 373 U.S. 546, 597-598 (1963) (state ownership of submerged land "cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3 of the Constitution").

Indeed, even where the states clearly have surrendered such a power to the national government, a pre-statehood exercise of that power will not necessarily diminish a newly-admitted state's sovereign rights. Pre-statehood federal action should be presumed an exercise of Congress' express power, under article IV, section 3, clause 2, to "make all needful rules and regulations respecting the territory or other property belonging to the United States." Such "needful rules and regulations respecting the territory" should not be viewed, as the United States contends here, as defeating or otherwise limiting a new state's sovereign rights where such a result is not required.

For example, in *Escanaba Co. v. Chicago*, 107 U.S. (17 Otto) 678 (1883), it was contended that a pre-statehood provision in the Northwest Ordinance of 1787, providing that the navigable waters of the territory were to remain free for public use, limited Illinois' post-admission power to construct bridges across the Chicago River. This Court stated:

> [The Ordinance's] provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any

> operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them. The language of the Act of Admission is "on an equal footing with the original States *in all respects whatever*." Equality of constitutional rights and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River.

107 U.S. (17 Otto) at 688-689 (emphasis in original; citation omitted).

Amici states do not suggest that pre-statehood federal action can have no continuing effect after admission of a new state to the Union. However, where it is asserted that pre-statehood federal action, not amounting to a conveyance, somehow affects a new state's sovereign title under the equal footing doctrine, as is urged here, the proper test is whether that federal action, if it had been taken after the new state's admission, would validly supersede state sovereign rights.

This is the same test this Court described for determining the validity of conditions imposed by Congress under its article IV, section 2, clause 1 power to admit new states into the Union. In *Coyle v. Smith*, 221 U.S. 559 (1911), it was contended that a provision in the 1906 Act admitting Oklahoma to the Union precluded the relocation of the state capitol from Guthrie to Oklahoma City. In rejecting this contention, this Court drew on the equal footing doctrine of *Pollard's Lessee*: "The plain deduction from [*Pollard's Lessee*] is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the Act under which the new state came into the Union, *which would not be valid and effectual if the subject of*

Congressional legislation after admission." *Coyle* 221 U.S. at 573 (emphasis added); *compare United States v. Sandoval*, 231 U.S. 28 (1913) (a pre-statehood federal prohibition on the introduction of alcohol into Indian country, reiterated in the New Mexico Enabling Act, does not encroach on that state's sovereign police power after admission because it was a legitimate exercise of Congress' express power to regulate commerce with Indian tribes).

It is particularly appropriate to apply the *Coyle* analysis in this case. *Coyle* expanded the equal footing doctrine of *Pollard's Lessee*, which applied it only in the context of title to the beds of navigable waterbodies, to the broader context of sovereign state rights generally. Its application here brings it full circle, once again applying it in the title navigability context from which it came.

Applying the *Coyle* analysis to this case is straightforward. A post-statehood federal designation of Utah Lake as a potential reservoir site would not have affected the automatic transfer of sovereign title to Utah. Accordingly, under *Coyle*, Congress could not have conditioned Utah's admission to the Union on the pre-statehood federal designation having that effect. *A fortiori*, the pre-statehood federal designation, standing alone, clearly cannot be given an effect which Congress could not achieve under its express constitutional power to admit new states.

Amici states believe this analytic approach strikes the proper balance between the inherent sovereign rights of the several states and the powers surrendered to the national government in the Constitution. On the one hand, it avoids the situation presented here where the lower court held that the limited pre-statehood federal withdrawal and reservation of Utah Lake as a potential reservoir site, never implemented, totally defeated Utah's sovereign title under the equal footing doctrine. At the same time, it ensures that the several states' inherent sovereign rights under the equal footing doctrine do not detract from or limit the United States' ability to discharge its constitutional responsibilities.

The potential implications of this case go to the heart of the relationship between the several states and the national govern-

ment. This Court's development and consistent application of the equal footing doctrine in the title navigability context merely reflects the broader proposition, central to our federal system, that all states are "equal in power, dignity and authority." *Coyle*, 221 U.S. at 567. Sovereign state rights, including a state's sovereign title to submerged lands (in the absence of a valid pre-statehood conveyance), cannot turn on pre-statehood federal action. The lower court's decision, denying Utah's sovereign title to the bed of Utah Lake because of pre-statehood federal action, must be reversed.

CONCLUSION

The decision below is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine. It is not supported by any of this Court's decisions and is in direct conflict with this Court's only decision addressing a federal withdrawal and reservation of submerged lands. For the foregoing reasons, as well as those advanced by petitioner State of Utah, the decision below must be reversed.

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